No. 87-1200

In The
Supreme Court of the United States
October Term, 1987

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BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY; BOARD OF TRUSTEES FOR ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY; JOHN KNIGHT, *et al.*; and NORMALITE ASSOCIATION, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Respondents.

—o—

RESPONSE OF ALABAMA STATE BOARD OF EDUCATION; AND WAYNE TEAGUE, STATE SUPERINTENDENT OF EDUCATION, RESPONDENTS, TO PETITION FOR WRIT OF CERTIORARI

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JEFFERY ALAN FOSHEE
JERRY F. BARTLETT
Postsecondary Education Department
4505 Executive Park Drive
Montgomery, AL 36116
(205) 244-7900

RICHARD N. MEADOWS,
JIMMIE ROBERT IPPOLITO, JR.
State Department of Education
State Office Building, Suite 609
501 Dexter Avenue
Montgomery, AL 36130
(205) 261-5320

Attorneys for Respondents Alabama State Board of Education; and Wayne Teague, State Superintendent of Education

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

I. QUESTIONS PRESENTED FOR REVIEW

Respondent Wayne Teague, State Superintendent of Education, presents the following question:

A. Whether the Court of Appeals acted properly when it determined that 28 U.S.C. Sections 455(a) and 455(b) mandated recusal when the District Judge possessed knowledge of and was involved in disputed evidentiary facts of the case and actively participated in the very events and shaped the very facts that became at issue in this suit.

Respondents the Alabama State Board of Education and Wayne Teague, State Superintendent of Education, present the following question:

B. Whether the Court of Appeals acted properly when it once again determined that Alabama State University and Alabama A&M University, as instrumentalities of the State, lacked standing.

II. PARTIES IN THIS COURT AND PARTIES IN THE COURT BELOW

The "Petitioners" in this Court are shown in the caption. The Respondents, in addition to the United States of America, are: The State of Alabama, the Governor of the State of Alabama; the Alabama Public School and College Authority; the Alabama State Board of Education; Wayne Teague, State Superintendent of Education; Auburn University, a public corporation; the Board of Trustees for the University of Alabama, a public corporation; and Troy State University, a public corporation.[1]

In the Court of Appeals below, the above named Respondents, excepting the United States of America, were all appellants.

In the Court of Appeals below, Petitioner John Knight, et al., was an appellee. The United States of America was also an appellee.

There were some parties in the District Court which were not parties to the appeal in the Court below. In particular, the "petitioners" Board of Trustees for Alabama State University, a public corporation, and the Board of Trustees for Alabama Agricultural and Mechanical University, a public corporation, were *not* parties in the Court of Appeals. The Court of Appeals has correctly characterized these two entities as being "non-appealing de-

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[1] Although Petitioners omitted the United States of America as a respondent in their statement of "Additional Parties In This Court And Parties In The Court Below," pursuant to Rule 19.6, Rules of the Supreme Court of the United States, these Respondents understand the United States of America to be a party respondent in this court.

fendants" in such court. *See* Appendix to Petition for Writ of Certiorari at 1a. [Thus, the statement at page iii of the Petition for Writ of Certiorari that "in the Court below, the petitioners here were all appellees . . ." is erroneous.] The Rules of the Supreme Court of the United States, particularly Rule 19.6, allow petitions for writ of certiorari to be filed only by "parties to the proceeding in the Court whose judgment is sought to be reviewed." Consequently, since Alabama State University and Alabama A&M University were not parties in the Court below, Alabama State and Alabama A&M may not properly seek review of the Court of Appeals decision.

At page iii of the Petition for Writ of Certiorari, Petitioners identify the Normalite Association as being an appellee in the Court of Appeals below. However, this identification is in error since the Normalite Association was *not* a party in the Court of Appeals below. *See* Appendix to Petition for a Writ of Certiorari at p. 1a.

Finally, these Respondents fail to understand that portion of the caption to the Petition for a Writ of Certiorari which refers to the "Normalite Association, et al.," in so far as it speaks to "et al." Although, at page iii, footnote 2 of the Petition for a Writ of Certiorari, Petitioners assert that "the Normalite Association group of intervenors also include the University Legal Defense Fund," the University Legal Defense Fund is not, of course, a "member" of the Normalite Association. Moreover, the University Legal Defense Fund was not a party in the Court of Appeals below. *See* Appendix to Petition for a Writ of Certiorari at p. 1a.

In sum, in so far as who are properly petitioners in this Court, the class of John Knight, et al., is a Petitioner, and was an appellee below. With respect to the Board of Trustees for Alabama State University; the Board of Trustees for Alabama Agricultural and Mechanical University; and the "Normalite Association, et al.," these entities were not parties in the Court of Appeals below. As to the Respondents, they are identified in the first paragraph hereinabove.

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V. CITATIONS TO OPINIONS BELOW

These Respondents agree with the statement of the Citation To Opinions Below as presented in the Petition for a Writ of Certiorari. However, such statement omits two further decisions concerning recusal. First omitted is the December 19, 1983, decision of Senior District Judge Hobart Grooms granting the motion to recuse, *United States v. State of Alabama*, — F.Supp. — (N.D. Ala. 1983). R. 2-73. *See* Appendix at pp. 1A-10A. Also omitted was

Judge Grooms' January 19, 1984, decision in which he vacated his December 19, 1983 Order and recused himself. *United States v. State of Alabama*, — F.Supp. — (N.D. Ala. 1984). R. 2-79. *See* Appendix at p. 11A.

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VI. JURISDICTION

Petitioners incorrectly assert that this Court has jurisdiction as to each of their petitions pursuant to 28 U.S.C. Section 1254(1). 28 U.S.C. Section 1254(1) provides for Supreme Court review of cases in the courts of appeals by writ of certiorari only "upon the petition of any *party* to any civil or criminal case . . ." (Emphasis added). Similarly, Rule 19.6, Rules of the Supreme Court of the United States, states that "all parties to the proceeding in the Court whose judgment is sought to be reviewed shall be deemed parties in this Court. . . ." The Board of Trustees for Alabama State University, the Board of Trustees for Alabama Agricultural and Mechanical University, and the "Normalite Association, et al.," were not parties in the Court of Appeals below. Therefore, these non-parties are without the ability to invoke the jurisdiction of this Court.

Petitioner John Knight, et al., was a party in the Court of Appeals below as is contemplated by 28 U.S.C. Section 1254(1) and Rule 19.6.

Consequently, the only question properly presented in the joint Petition for a Writ of Certiorari is that related to recusal, since the Petition's arguments as to standing were

asserted only by the Board of Trustees for Alabama State University and the Board of Trustees for Alabama Agricultural and Mechanical University.

VII. STATEMENT OF THE CASE

Although this case has a long and complicated procedural history, these Respondents' statement of the case focuses upon those matters relevant to a consideration of the two questions presented in the Petition for a Writ of Certiorari. Accordingly, the procedural history of the case is stated in two parts. Presented first is a general overview of the case as a whole, including those matters related to the lack of standing of the Board of Trustees for Alabama State University and the Board of Trustees for Alabama Agricultural and Mechanical University. Then presented are those portions of the proceedings below relevant to recusal. [The Board of Trustees for Alabama State University is hereinafter referred to as "ASU," while the Board of Trustees for Alabama Agricultural and Mechanical University is referred to as "A&M."]

A. *General Overview of Proceedings Below.* In 1978, the Office of Civil Rights (OCR) of the United States Department of Health, Education and Welfare, conducted a Title VI compliance review of Alabama public higher education. In January of 1981, the Governor of Alabama was notified by the U.S. Department of Education of the Department's findings that there remained vestiges of a prior, racially dual system of higher education in Alabama

in violation of Title VI of the 1964 Civil Rights Act. Appendix to Petition for a Writ of Certiorari p. 3a.

In January 1981, John F. Knight, Jr. and other students, graduates, faculty and employees of Alabama State University (the Knight Intervenor class) filed an action styled *Knight v. James* in the Middle District of Alabama seeking the merger of two Montgomery, Alabama area universities into a third Montgomery area institution—the predominantly black ASU.

The United States filed the instant action on July 11, 1983. The Complaint named as defendants the State of Alabama, its Governor, the State Board of Education, the State Superintendent of Education, the Alabama Commission on Higher Education, the Alabama Public School and College Authority, and some ten universities. The Complaint charged violations of Title VI and the Fourteenth Amendment of the United States Constitution based upon the theory that Alabama had failed to remove the vestiges of a prior racially dual system of public higher education. The relief requested was that the defendants be required to develop and implement plans to eliminate such alleged vestiges. Appendix to Petition for a Writ of Certiorari p. 4a.

In September 1983, the Knight class moved to intervene in the instant case. In effect, the Knight class sought to have their claims, previously existing in the Middle District of Alabama case styled *Knight v. James*, incorporated into the instant case then pending in the Northern District of Alabama. The motion to intervene was granted and in January 1985 the Knight class of Montgomery area

ASU students, alumni, and employees, was recertified in the present action.

In July and August of 1983, A&M and ASU moved to be realigned as plaintiffs in order to assert claims against the other defendants. Over the objections of defendants, in September 1983 the District Court granted such motions.

In September 1983, Auburn University and State Superintendent of Education Wayne Teague moved to disqualify the District Judge pursuant to 28 U.S.C. Sections 144 and 455. Further proceedings with respect to the recusal issue are discussed in Section B below.

Trial was held in July 1985, and on December 9, 1985, the District Court issued its memorandum opinion. Said Opinion appears as Appendix C beginning at page 62a of the Appendix to Petition for a Writ of Certiorari. The District Court ordered the Defendants, not including these Respondents, to submit a remedial plan designed to eliminate vestiges of a dual system. On February 14, 1986, the Court of Appeals stayed all further District Court proceedings.

Thereafter, one aspect of the litigation concerning teacher education programs at ASU was considered on appeal to the United States Court of Appeals for the Eleventh Circuit. The issue of whether Alabama State University possessed standing was addressed, with the Court of Appeals determining that ASU lacked standing to assert Title VI and Fourteenth Amendment claims. A petition for writ of certiorari, seeking a review of the standing question was denied by this Court. *United States*

v. State of Alabama, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, — U.S. —, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987).

Subsequently, the remaining portions of the case were considered by the Court of Appeals, and on October 6, 1987, the Court of Appeals reversed and remanded the case to the District Court, having found that 28 U.S.C. Section 455 required disqualification of the trial judge and that the "statewide system" approach of plaintiffs was not in compliance with the requirements of "program specificity" and "federally funded programs" of Title VI. The judgment of the Court of Appeals not only disqualified the trial judge and reiterated ASU and A&M's lack of standing, but also found erroneous the entire theoretical foundation for the various plaintiffs' claims.

No petition for rehearing or rehearing *en banc* was made to the Court of Appeals.

The Petition for a Writ of Certiorari presently before this Court was filed by four entities, only one of whom was a party in the Court of Appeals.

B. *Proceedings Concerning Disqualification.* On September 6, 1983, Auburn University moved to disqualify District Judge U. W. Clemon pursuant to 28 U.S.C. Sections 144 and 455. On September 9, 1983, State Superintendent of Education Wayne Teague filed a similar motion. Appendix to Petition for a Writ of Certiorari 12a. These motions alleged bias, extrajudicial knowledge of disputed evidentiary facts (from involvement in litigation styled *Lee v. Macon*), and the appearance of impropriety. R. 26, 33. Judge Clemon denied the motions, ruling that the affidavits supporting the motions were technically insufficient.

Auburn then filed in the Court of Appeals a Petition for a Writ of Mandamus. The Court of Appeals issued the Writ, holding that the affidavits supporting the motions were technically sufficient, and directed that another judge be assigned to hear the recusal proceedings. Appendix to Petition for a Writ of Certiorari at p. 12a; *In re: Auburn University*, — F.2d — (No. 83-7557) (11th Cir., Nov. 10, 1983).

In December 1983, Senior District Judge Hobart Grooms of the Northern District of Alabama granted the motions for recusal, having determined that (1) Judge Clemon's involvement as counsel of record in *Lee v. Macon County Board of Education* gave him personal knowledge of disputed evidentiary facts; and (2) based on other grounds asserted in the motions for recusal, a reasonable person would harbor doubt as to the trial judge's impartiality. *United States v. State of Alabama*, — F.Supp. — (N.D. Ala., Dec. 19, 1983), vacated — F.Supp. — (Jan. 19, 1984). *See* Appendix at pp. 1A-10A.

Thereafter various statements about Judge Grooms' decision were attributed, whether accurately or not, to Judge Clemon in the *New York Times*, *The Washington Post*, and *The National Law Journal*. In one news media publication Judge Clemon was quoted as calling Judge Grooms' decision on recusal "tenuous" and that "the most charitable thing I can say about it is that it is strange." Judge Clemon was also reported as filing a "motion with Judge Grooms questioning the refusal to let him testify about his relationship to the parties and issues in the case." On January 19, 1984, Judge Grooms vacated his order and recused himself. R. 2-17.

Senior Circuit Judge David Dyer then heard defendants' disqualification motions and denied them. Appendix to Petition for a Writ of Certiorari at p. 13a. Judge Dyer concluded that the affidavits to the motions did not connect Judge Clemon's involvement in *Lee v. Macon* to any aspect of the case. However, Judge Dyer's conclusions were necessarily based upon his own *predictions* as to what would be argued and considered relevant by the trial judge once the trial was conducted. [As the Court of Appeals subsequently determined, during the trial of this case *Lee v. Macon* was made relevant by the positions of the parties, evidence submitted, and rulings upon the admissibility of such evidence.] Judge Dyer then denied Auburn's request to certify the recusal issue for interlocutory appeal under 28 U.S.C. Section 1292(b). Appendix to Petition for a Writ of Certiorari at p. 13a.

During July 1985, trial was held, and on December 9, 1985, the District Court entered an order and opinion. The Court of Appeals then reversed and remanded the case back to the District Court having found, among other things, that disqualification of the trial judge was required. The Court of Appeals determined that disqualification was mandated because of Judge Clemon's knowledge of and involvement in disputed evidentiary facts and issues. Appendix to Petition for a Writ of Certiorari at p. 27a.

A number of grounds for recusal were presented and considered by the Court below. The Court of Appeals held three grounds each to be sufficient to mandate recusal: (1) Judge Clemon's involvement in disputed factual issues surrounding the composition of universities'

governing boards; (2) Judge Clemon's involvement in legislative efforts to improve A&M's physical plant; and (3) Judge Clemon's extrajudicial knowledge of and involvement in disputed evidentiary facts concerning *Lee v. Macon*, particularly the State's treatment of black high school principals. Appendix to Petition for a Writ of Certiorari p. 27a.

In the interest of economy and brevity, the State Superintendent of Education joins in and adopts by reference the statement of the case and arguments supporting recusal as set forth in the response of Auburn University to the Petition for a Writ of Certiorari. However, with respect to the various grounds for recusal, the State Superintendent strongly supports and urges knowledge of disputed evidentiary facts from *Lee v. Macon* to be most important, since it is this matter which most directly affects his interests and the interests of the Alabama State Board of Education. The Alabama State Board of Education and State Superintendent of Education were principle defendants in *Lee v. Macon*. Judge Clemon was once an attorney for plaintiffs in *Lee v. Macon*.

1. *Lee v. Macon—Knowledge and Involvement in Disputed Evidentiary Facts.* The Court of Appeals accurately and fairly described the *Lee v. Macon* recusal ground as follows:

> The trial judge's activities as a private lawyer also involved him in the disputed evidentiary facts of this case. Judge Clemon served as an attorney of record for individual plaintiffs in the school desegregation case of *Lee v. Macon County Board of Education*. Filed in 1970, *Lee v. Macon*, included claims under title VI of the Civil Rights Act against many of the

same institutions of higher learning as appear here. These claims took place during periods of time which are relevant to the present case under the "vestiges" theory utilized by plaintiffs. In denying the recusal motion, Judge Clemon stated that he took no part in the portion of *Lee v. Macon* involving institutions of higher education. He noted that the caption of *Lee v. Macon* was used in many smaller actions that grew out of the original suit. According to Judge Clemon, his involvement was restricted to the representation of black high school principals in a race discrimination suit. Even this limited involvement in *Lee v. Macon*, however, left Judge Clemon with knowledge of facts that were in dispute in the instant case. The State's treatment of black high school principals during the period the trial judge represented their cause became a factual issue at trial. Plaintiff presented testimony about the long, continuous history of racially discriminatory employment practices suffered by black high school principals in Alabama. A study also was offered "for the purpose of demonstrating that there was, during the period covered [1966-1970], a decrease, substantial decrease in the number of percentage in black educators in Alabama in general, and black principals in particular." Over defendants' objection, the trial judge accepted in evidence the testimony and exhibits about the status of Alabama's black high school principals. Judge Clemon admitted this evidence as relevant to prove "that as a vestige of the prior de jure system, the state enforced and pursued racially discriminatory employment practices during the period covered by the study." On this issue—whether black high school principals suffered racial discrimination—Judge Clemon was once again faced with evaluating evidence of which he had special extrajudicial knowledge.

The language of Section 455(b) is unequivocal: [A judge] shall also disqualify himself in the following circumstances:

> (1) Where he has . . . *personal knowledge of disputed evidentiary facts* concerning the proceeding.

The Reporter's Notes to the Code of Judicial Conduct are equally clear: "The Committee also concluded that a judge cannot be, or cannot appear to be, impartial if he has personal knowledge of evidentiary facts that are in dispute." Judge Clemon's disqualification is thus mandated because of his involvement in the disputed factual issues surrounding the composition of defendants' governing boards, the legislative efforts to improve A&M's physical plant, and the State's treatment of black high school principals. Such personal knowledge vitiates the carefully constructed rules of procedure and evidence that ensure deliberate, unbiased fact finding. Litigants also are entitled to have their case decided by a judge who can approach the facts in a detached, objective fashion. Judge Clemon's partisan efforts in these disputes raise legitimate questions about his impartiality in deciding these factual matters. To permit Judge Clemon to decide a case in which he had extrajudicial, personal knowledge of disputed facts would be contrary to the express language and underlying spirit of the statute, as well as the case law.

This court is not impervious to the burden that disqualification at this juncture places on the court system, the litigants, and the people of Alabama. We recognize that new proceedings before a new judge will exact a not inconsiderable cost in time, energy, and legal fees. The intensity and complexity of this litigation, however, is a measure of its significance. We consider the future of higher education in Alabama too important to be decided under a cloud. In a decision such as this one, a decision which will affect millions of Alabamians, public confidence in the judicial system demands a judge free from personal knowledge or biases about the issues before the court. For

this reason, we disqualify Judge Clemon and remand for a new trial.

United States v. The State of Alabama, 828 F.2d 1532 (11th Cir.1987), as appearing at the Appendix to Petition for a Writ of Certiorari at pages 26a-29a.

In their Petition for a Writ of Certiorari, at page 10, Petitioners apparently attempt to minimize the importance of Judge Clemon's knowledge of disputed evidentiary facts growing from his participation in *Lee v. Macon* as well as the importance of *Lee v. Macon* to the trial of this case. Petitioners speak of "the introduction in the month-long trial of a single exhibit, out of thousands . . ." However, an examination of the record indicates that far from being a small matter, *Lee v. Macon* was a large factor in the trial of this case. Rather than being a minor matter mentioned just a few times, a review of the transcript of the trial indicates that *Lee v. Macon* by name was mentioned, discussed, or argued about in some form by the Court, counsel, or witnesses at least 89 times. This averages over the 25 days of trial, to approximately 3 and ½ times per day. This does not, of course, even begin to take account the many exhibits which may have been offered into evidence and received without counsel or the court's specifically mentioning "*Lee v. Macon*," or the many times *Lee v Macon* was referenced not by name but by such terms as "three-judge District Court finding" or "the Court order." The brief of the State Superintendent of Education submitted to the Court of Appeals lists each page of the trial court record at which one of these instances concerning *Lee v. Macon* can be found. Further, *Lee v. Macon* was discussed not only with respect to the treatment of black principals and other educators, but also

discussed was: an alleged spirit of defiance to *Lee v. Macon* court orders; the applicability of *Lee v. Macon* to senior institutions; various officials, including these Respondents, reaction to *Lee v. Macon* orders; State Board of Education involvement in *Lee v. Macon;* arguments that the creation of separate boards of trustees for universities in Alabama was an attempt to "get out from" *Lee v. Macon;* compliance reports by various defendants pursuant to *Lee v. Macon;* and instances in which the trial judge attempted to recall various aspects of *Lee v. Macon* orders (for example, "as I recall *Lee v. Macon County,* there is some discussion of the HEW guideline . . . "). In sum, the importance of *Lee v. Macon* was not limited to some off-hand mention of it during the trial, but rather *Lee v. Macon,* within the context of Judge Clemon's personal knowledge of disputed evidentiary facts arising from it, was an integral component in plaintiffs' prosecution of their case.

2. *Timeliness.* In their Petition for a Writ of Certiorari, petitioners attempt to make an issue of the timeliness in which various grounds for recusal were advanced. These Respondents will fully address this matter in the Argument section of this Response. However, this false issue is put to rest rather easily. These Respondents would simply point out that the Court of Appeals held three different grounds of recusal, each sufficient to mandate disqualification of the trial judge. One of these grounds held sufficient was the judge's personal knowledge of disputed evidentiary facts concerning the proceeding, such knowledge resulting from his prior representation of plaintiffs in *Lee v. Macon County Board of Education.* This "*Lee v. Macon* ground" was first pre-

sented in the original motion for recusal filed by the State Superintendent of Education on September 9, 1983. The trial of the case was not held until July of 1985. Thus, there is no question whatsoever that with respect to at least one of the grounds for disqualification, the motion and supporting ground was timely asserted. Therefore, Petitioners' assertion (albeit erroneous) that other grounds for recusal were not timely presented, cannot at all logically affect the disposition of this case.

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VIII. SUMMARY OF THE ARGUMENT

Petitioners assert two arguments in support of their Petition for a Writ of Certiorari, one concerning disqualification of the trial judge and one concerning the standing of ASU and A&M. Neither argument merits the granting of the Petition.

With respect to disqualification of the trial judge, the decision of the Court of Appeals below was correct in that the trial judge's activities as an attorney in *Lee v. Macon County Board of Education* involved him in disputed evidentiary facts of this case so as to mandate disqualification under 28 U.S.C Section 455. Petitioners would have this Court believe that the decision below is in conflict with the decisions of other circuits based upon their allegation that Auburn University was untimely in presenting facts in support of one of the grounds for recusal. However, Petitioner's argument in this regard is erroneous. First, the decision did not turn upon a question of timeliness. The Court of Appeals specifically found that

even if timeliness requirements were to be applied to Section 455(b), that Auburn University and the State Superintendent of Education timely presented their motions for recusal at the earliest stages of the litigation. The Court of Appeals did *not* say that timeliness was not required under Section 455. Rather, it concluded that even assuming *arguendo* that timeliness was required, Auburn and the Superintendent acted timely.

Second, Petitioners gloss over the important fact that the motions for recusal were based upon more than one ground for disqualification. The initial motions alleged three separate and distinct grounds, one of which concerned the trial judge's knowledge of disputed evidentiary facts growing from his being counsel in *Lee v. Macon*. Subsequently, new facts supporting new grounds were discovered by Auburn University and presented. Therefore, even if the new grounds were not presented in a timely fashion, at a minimum the "*Lee v. Macon*" ground was clearly presented timely. The Court of Appeals found that each of three distinct grounds mandated recusal, including the *Lee v. Macon* ground. Consequently, Petitioners' focus upon the timeliness of only one of these grounds ignores the logical reality that in any case the Court of Appeals decision was correct.

With respect to standing, there are several reasons why Petitioners' arguments are unavailing. First, the standing argument is presented in the Petition for a Writ of Certiorari only by ASU and A&M. As previously mentioned, however, these entities were not parties to the decision below and therefore may not properly participate in the Petition. Second, Petitioners' attempt to construct

an "oath of office" argument to gain standing ignores the fact that only the two *entity* universities were ever parties to this case, and not the individual *members* of the board of trustees of said universities.

In any case, the oath of office argument was not presented to the District Court below. However, it was presented to this Court in the Petition for a Writ of Certiorari in Case No. 86-749. The Petition was denied. *United States v. State of Alabama,* 791 F.2d 1450 (11th Cir. 1986), *cert. denied,* — U.S. —, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987).

Furthermore, nowhere in the record below does there appear any evidence supporting the idea that the members of the Boards of Trustees of Alabama State University and Alabama A&M University were required to take an oath of office or ever took an oath of office.

Finally, regardless of the oath of office argument, it is clear that as instrumentalities of the State these two universities lack standing to assert claims against these Respondents under the Fourteenth Amendment, Section 1983, or Title VI.

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IX. ARGUMENT

A. Recusal

There are three principle reasons why the recusal argument advanced in the Petition for a Writ of Certiorari should not persuade this Court to grant the Writ. First, the decision of the Court of Appeals as to recusal was correct. Second, the cases which Petitioners erro-

neously assert establish a conflict among the decision below and decisions of other circuits, upon even a cursory examination, simply do not establish such a conflict. Rather those cases are entirely distinguishable. Third, due to other aspects of the Court of Appeals decision having a profound impact upon the ultimate retrial of this case, the granting of the Writ would not serve the ends of justice.

1. *The Court of Appeals Decision Was Correct.* The trial judge participated as counsel for private Plaintiffs Lee, et al., in the case of *Lee v. Macon County Board of Education*, 317 F.Supp. 103 (M.D. Ala. 1970), *affirmed in part, modified in part*, 453 F.2d 524 (5th Cir. 1971). *Lee v. Macon* involved claims under Title VI of the Civil Rights Act against the State Board of Education, State Superintendent of Education, many of the universities which are parties to this case, and local elementary-secondary boards of education. As noted by the Court of Appeals, "these claims took place during periods of time which are relevant to the present case under the 'vestiges' theory utilized by Plaintiffs." Appendix to Petition for a Writ of Certiorari p. 26a. In other words, the trial judge was plaintiffs' counsel in an action in which there were claims of race discrimination in Alabama public colleges during a period of time considered by the Petitioners and trial judge as relevant to the present action.

The argument has been made that Judge Clemon's role in *Lee v. Macon* was limited to that portion of the case involving elementary-secondary education, and thus was irrelevant to the trial of this "higher education case." Petition for a Writ of Certiorari p. 10. The implication is apparently that the Court of Appeals discovered "a

single exhibit, out of thousands" which would link up the elementary-secondary aspects of *Lee v. Macon* to higher education issues in this case. This proposition is without merit for two important reasons. First, to talk about generalities of elementary-secondary education versus higher education conveniently ignores the concrete actual knowledge of disputed evidentiary facts which the Court of Appeals found to exist. Second, even if one were to address the broad so-called comparison, far from elementary-secondary education being distinguished from higher education, Plaintiffs themselves asserted that facts which Petitioners term "elementary-secondary matters" were relevant to this case for the purpose of demonstrating discriminatory motive, intent, or practices by the Respondents.

Lee v. Macon involved claims based upon allegations of racial discrimination during the 1950's and 1960's on the part of higher educational institutions formerly administered by the Alabama State Board of Education. These allegations *asserted a broad attitude* toward race and education (elementary-secondary and higher education) on the part of State officials and institutions as a whole—not just particular universities in isolation from other schools and officials. In other words, a "history" was alleged as the factual basis of intentional discrimination. Petitioners used *Lee v. Macon* as proof of vestiges. Furthermore, although Petitions erroneously consider *Lee v. Macon* as being irrelevant for purposes of recusal, they destroy their own views by having used *Lee v. Macon* as an integral part of their proof. As detailed in the brief of the State Superintendent in the Court of Appeals, *Lee v. Macon* was mentioned, discussed, or argued in some

form by the Court and counsel at least 90 times, probably more, during the trial of this case. Over the twenty-five days of trial, there was an average of approximately three and a half times per day that evidence related to *Lee v. Macon* was submitted, or the impact of *Lee v. Macon* was discussed. Surely Petitioners cannot be serious in their attempt at minimizing the significance of *Lee v. Macon* to this case. If *Lee v. Macon* was so irrelevant, one must consider why Petitioners thought it so necessary to the prosecution of their claims.

Also, in their Petition for a Writ of Certiorari, Petitioners seem to prefer to speak almost exclusively of Judge Dyer's opinion on recusal. However, that opinion is not due the significance which Petitioners would subscribe to it. Judge Dyer's opinion was not the only place in which recusal was considered. Rather, the recusal motions were considered thoroughly by a number of judges on more than one occasion. Further, after trial of the case the Court of Appeals, with the benefit of all arguments and the entire record, carefully and thoroughly examined the issue. Judge Dyer, addressing recusal before trial, could only *predict* whether *Lee v. Macon* would become relevant to the trial of this case. The Court of Appeals, however, had the benefit of examining the entire record, including the evidence submitted, and rulings of the trial judge on whether "*Lee v. Macon*" evidence was sufficiently relevant to be admissable. Obviously, therefore, the proper decision for examination as to the relevance of *Lee v. Macon* is that of the Court of Appeals, not Judge Dyer.

2. *Timeliness.* Petitioners are in error when they assert in their Petition that the decision below is in con-

flict with the decisions of the other Circuits regarding the timeliness of a motion filed pursuant to 28 U.S.C. Section 455. Petitioners assert that "the decision below conflicts in a number of respects with the decisions of other Circuits which have adopted procedural rules to prevent abuse of 28 U.S.C. Section 455. In allowing a litigant to raise new grounds for recusal without time limit, the decision below is in conflict with decisions of the Second Circuit . . ., the Fifth Circuit . . . , and the Ninth Circuit . . ." (citations omitted). However, Petitioners' argument in this regard must fail for two reasons. First, the decision below is in fact *not* in conflict with the decisions of other circuits. Second, and more importantly, the instant case does not turn on the question of timeliness.

In making the above-referenced argument, Petitioners cite three cases apparently for the proposition that a requirement of timeliness should be read into 28 U.S.C. Section 455: *In re International Business Machines,* 618 F.2d 923, 932 (2d Cir. 1980); *Delesdernier v. Porterie,* 666 F.2d 116 (5th Cir. 1982), *cert. denied,* 459 U.S. 839 (1982); and *United States v. Conforte,* 624 F.2d 869 (9th Cir.) *cert. denied* 449 U.S. 1012 (1980). Without focusing its attention upon Section 455(b) as distinguished from 455(a), the Second Circuit in *In re International Business Machines,* reached the general conclusion that motions made under 455 must be made in a timely manner. Of course, the context within which this conclusion was reached should be noted. The case began in January 1969 and upon ending in the District Court in 1979, in the words of the Second Circuit, "A mammoth record of trial transcript and exhibits has been assembled. To the best of our knowledge no litigation has taken so much time and involved such

expense." Only after said marathon was run was a post-trial motion for recusal made. Similarly, in *Delesdernier v. Porterie, supra,* the Fifth Circuit held that a motion for disqualification of the trial judge which was raised for the first time on appeal after two full trials on the merits was obviously untimely. This decision was made in the context of disqualification pursuant to Section 455(a). Likewise, in *United States v. Conforte, supra,* a party was not permitted to raise for the first time on appeal a *motion* for recusal when he was aware of the *grounds* supporting the motion during pendancy of the matter in the trial court. The party also failed to remind the trial judge of the matter even when the question of the judge's qualification to sit was expressly discussed before trial. *Id.* at 879.

One can draw from these three cases a general proposition that a party who becomes aware of facts and circumstances justifying or requiring recusal may not rest a long time on such knowledge and only make a motion for disqualification on appeal or after a judgment adverse to it. With such a proposition, particularly as it relates to Section 455(a),[2] these Respondents have no disagreement.

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[2] The cases considering the applicability of timeliness requirements to motions made under 28 U.S.C. Section 455 tend to occur more often than not in motions made under sub-section (a) of Section 455 rather than sub-section (b). For example, the Eleventh Circuit has applied a timeliness requirement to recusal motions made pursuant to Section 455(a). *United States v. Slay,* 714 F.2d 1093 (11th Cir. 1983), *cert. denied,* 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed. 2d 189 (1984). *See also* Note, Disqualification of Federal Judges for Bias or Prejudice, 46 U.Chi. L.Rev. 236, 265 (1978). Thus it may well be that considerations of timeliness do not apply to sub-section (b), at least not to the same degree as they apply to sub-section (a). Regardless, however, the motions made in the instant case were clearly timely.

Yet, such a general rule has no application to, nor any conflict with the decision of the Court of Appeals below.

At footnote 49 of the decision below the Court of Appeals thoroughly examined the issue of whether considerations of timeliness apply to Section 455. The Court did not reject the notion of timeliness under Section 455. Rather, it concluded that even if assuming *arguendo* a requirement for timeliness existed here, the parties seeking disqualification acted in a timely manner. The Court noted the following:

> Appellants here were not acting to delay or to speculate on a favorable substantive judgment in the interim. *Motions to disqualify Judge Clemon were filed at the earliest stages of the litigation and aggressively prosecuted throughout.* Appellants did not discover relevant information about Judge Clemon's activities as a State Legislator until late in the litigation, and raised this ground for disqualification at the first available moment . . . Given the critical importance of the appearance of impartiality guaranteed by Section 455, we refuse to adopt the cramped interpretation of this statute asserted by Appellees here. (Emphasis added).

Consequently, it is evident that in no way did the Court below act contrary to decisions of other circuits applying a requirement of timeliness. The Court simply reasoned that if Auburn University and the State Superintendent were required to act timely, they did so. They did so in making a motion during the very earliest stages of the litigation, asserting the grounds in support of the motion of which they were aware at the time, and vigorously pursuing disqualification. In no way did Auburn and the Superintendent attempt to improperly apply Sec-

tion 455. To the contrary, in the face of massive and complex litigation of great importance to the citizens of Alabama, Auburn and the Superintendent made their position clear from the outset. In sum, the decision is not in conflict with the decisions of other circuits so as to justify review by his Court.

Petitioners' argument concerning the timeliness of disqualification motions must also fail because the decision below did not, in fact, turn upon timeliness. That is, the motions for recusal were made by the State Superintendent of Education and Auburn University early on in the litigation—well before trial. These motions alleged more than one ground in support of recusal, including the ground that the judge possessed extrajudicial knowledge of disputed evidentiary facts from his involvement as counsel in *Lee v. Macon*. Subsequently, Auburn discovered additional relevant information about Judge Clemon's activities as a State Legislator and presented it in a timely fashion. Petitioners assert that the judge should not have been disqualified due to to their belief that Auburn inordinately delayed its presentation of the additional facts it subsequently discovered concerning the judge's activities as a Legislator. However, even assuming *arguendo* that Auburn was untimely in presenting these additional facts (although Auburn was *not* untimely), recusal is still required. Recusal is still required because the original motion for recusal was made long before trial at a time which no reasonable person could call other than timely. That motion included the assertion of knowledge of disputed evidentiary facts concerning *Lee v. Macon*. The Court of Appeals found that this ground was, itself, suf-

ficient to mandate recusal. Consequently, Petitioners' focus upon alleged untimeliness in presenting one ground for a recusal cannot affect the validity and correctness of the Court of Appeals' decision to disqualify Judge Clemon. That is, even if one ground for a recusal was presented untimely, the remaining grounds were timely and still mandate recusal. Each ground for disqualification—involvement in disputed factual issues surrounding the composition of defendants' governing boards, the legislative efforts to improve A&M's physical plant, *and* the State's treatment of black high school principals—independently necessitate disqualification.

3. *Review does not sufficiently serve the ends of justice.* As a final observation concerning recusal, these Respondents would respectfully note that even if Petitioners were able to point out some error in the Court of Appeals decision as to recusal, the case is still not worthy of review by this Court in view of the unnecessary burden it would impose upon the Court's extremely valuable and very limited resources. Specifically, the Court of Appeals reversed and remanded the case to the District Court not only due to its conclusion that the trial judge must be disqualified, but also because of its conclusion that Plaintiff the United States had not prosecuted its case in compliance with the program specificity requirements of Title VI. In other words, the Court of Appeals held that the action could not be prosecuted against the entire State "system" of higher education in Alabama without specifying which programs and activities within the individual universities receive federal funds and how those particular programs and activities were discriminatory. Because Plaintiffs presented their case in a manner inconsistent

with the requirements of Title VI, the case was properly remanded to the District Court with directions that the Complaint of the United States be dismissed without prejudice. Therefore, it is obvious that regardless of the conclusions of the Court of Appeals related to recusal, the case must at least in part begin again in the District Court and proceed to a new trial. Consequently, whether Judge Clemon should have been disqualified becomes, at least in a financial and efficiency of justice context, a purely acádemic inquiry. Whether Judge Clemon were to remain as judge, or a new judge were to handle the case, the case must begin anew in the District Court. For this Court to grant review in such a circumstance, especially given the fact that the decision below is not in conflict with the decisions of other circuits, would amount to this Court devoting its important time and energies to a case of far less importance than others presently pending on petitions for writ of certiorari.

———o———

B. STANDING[3]

With regard to the standing arguments presented in the petition, this case is not without its history. That is, Petitioners simply assert unmeritorious arguments which when previously urged upon this Court as reasons to grant a writ of certiorari (No. 86-749), the Court found insufficient to invoke this Court's review.

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[3] The Respondents adopt by reference the arguments made by Respondents Auburn University and the University of Alabama concerning standing.

Moreover, the Petition for a Writ of Certiorari should not be granted based upon Petitioners' standing argument since the standing issue is not before this Court. That is, in the Petition only ASU and A&M attempt to present the standing question. Yet, as previously discussed, ASU and A&M were not parties in the Court of Appeals below and are therefore without authority to present a petition for a writ of certiorari to this Court. However, as a secondary response, even assuming *arguendo* that Petitioners' standing argument is properly before this Court, the argument must fail for the following reasons.

Petitioners apparently argue that "public officials, like petitioners in this case . . ." who believe that some State entity may be interfering with their perceived individual, personal duties to obey their oaths to uphold the United States Constitution gain standing from such a belief. Petition for a Writ of Certiorari p. 26.

First, "Petitioners" apparently forgot who they are. The Petitioners are the two State *entities* (bodies corporate) named the Board of Trustees for Alabama State University and the Board of Trustees for Alabama Agricultural and Mechanical University. The Petitioners are *not* the individual members of said Boards of Trustees. The individual Board members have never, in any capacity or any pleading in this case, been defendants or plaintiffs. Indeed, ASU's Motion for Realignment, ASU's Motion for Leave to File Amended Claims, ASU's Amended Claims, A&M's "Cross-Claims," A&M's Amended Claims, and A&M's Supplement to Amended Claims (each of which appears in the Appendix to this Response), all

speak in terms of the claims of the two instrumentalities of the State of Alabama—the Board of Trustees for Alabama State University and the Board of Trustees for Alabama Agricultural and Mechanical University. ASU and A&M's pleadings in the District Court do not even themselves assert any harm to the individual Board members.

Petitioners ASU and A&M have constructed an argument for standing (not presented in the District Court) which is based upon the theory that the individual Board members are being forced to violate their oaths to uphold the Constitution. However, given the above observation that the parties are the State entities, Boards of Trustees of ASU and A&M (and not their individual Board members), it is obvious that Petitioners do not even face the predictament they suppose. That is, the State entities ASU and A&M do not, and of course cannot, take an oath of office. Consequently, they cannot use a supposed oath of office allegedly given to non-party Board members as a method for belately discovering grounds for standing.

State entities (as opposed to officials or employees) do not take oaths of office. State entities, therefore, cannot use the oath of office theory to create standing where it does not already exist. For this reason alone, the judgment of the Court of Appeals below that ASU and A&M lacked standing under the Fourteenth Amendment, Title VI, or 42 U.S.C. Section 1983 was correct.

Secondly, Petitioners' standing argument must fail because there is no evidence in the Record below of any expressed statutory requirement upon the Boards of Trustees of ASU and A&M, nor their individual members, to subscribe to an oath to uphold the Constitution.

Third, Petitioners' oath of office argument was, rather curiously, not presented in the District Court below. In none of their pleadings did ASU or A&M argue that they were forced to violate their oath of office. Appendix at pp. 12A-66A.[4] It was in ASU's previous petition for a writ of certiorari, in Case No. 86-749, that Petitioners first attempted to bootstrap their alleged standing by claiming a violation of their oath of office. The Petition was denied. *United States v. State of Alabama*, 791 F.2d

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[4] These respondents do not suggest or imply that due to the absence of the above, that the members of the Boards of Trustees of ASU and A&M may legitimately violate provisions of the Constitution. Rather, the absence of the above illustrates the lengths at which ASU and A&M will travel to attempt to construct a legitimate basis for their argument that a State created entity may sue its creator.

This is not to say that State agencies, including public school districts, have never been allowed to assert equal protection in claims against the state that created them. Several cases, most notably *Brewer v. Hudson School District No. 46*, 238 F.2d 91 (8th Cir. 1956), stand for the proposition that local school boards may sue the state to protect the constitutional rights of their students. *Akron Board of Education v. State Board of Education of Ohio*, 490 F.2d 1285 (6th Cir. 1974), *cert. denied*, 417 U.S. 932 (1974). These cases represent the single instance in which the federal courts have allowed State agencies to sue their creator—where the institution is suing to enjoin a specific legislative act in order to protect the rights of its individual students and where the State has allegedly placed the agency's officials in the position of either violating a State law or a constitutional duty to desegregate. Notably these cases show that the State agency's position only confers standing in the Article III sense, not a right to equal protection in the agency or institution, itself, *See, e.g., Akron Board of Education v. State Board of Education of Ohio, supra*, as asserted by ASU and A&M. ASU and A&M do not assert in their Petition any attempt to sue in order to protect the rights of individual students, as opposed from their own institutional preferences. Regardless, such an assertion would be rather ludicrous since the students are themselves a party to this case as the "Knight-Intervenors."

1450 (11th Cir. 1986), *cert. denied,* — U.S. —, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987).

Fourth, in any event, ASU and A&M have no constitutional duty to file lawsuits. They cite no specific interference by defendants, nor do they cite any State law or regulation placing them in the posture of violating the United States Constitution in order to comply with State law. Moreover, any constitutional duty which the non-party members of the Board of Trustees might have would be to conform their own individual conduct with that of the Constitution—not to affirmatively seek to change the conduct of others.

Finally, ASU and A&M simply have no standing to assert Fourteenth Amendment, Section 1983, or Title VI claims against these Respondents. As the Eleventh Circuit Court of Appeals stated in the previous appeal growing from the instant controversy, "ASU thus had no standing to sue or seek to enjoin the Alabama State Board of Education under Section 1983 and the Fourteenth Amendment. . . . We turn next to the question of whether ASU has a right to sue the State under Title VI. . . . We conclude that no such right of action exists." *United States v. State of Alabama,* 791 F.2d 1450, 1456 (11th Cir. 1986), *cert. denied,* — U.S. — 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987). Obviously, A&M is in no different position than ASU. *See also Town of Ball v. Rapides Parrish Police Jury,* 746 F.2d 1049, 1051 n.1 (5th Cir. 1984); *Appling City v. Municipal Elec. Authority of Ga.,* 621 F.2d 1301, 1308 (5th Cir. 1980), *cert. denied,* 449 U.S. 1015 (1980); *Commonwealth of Pa. v. Porter,* 659 F.2d 306, 327 n.3 (3rd Cir. 1981) *en banc* (standing recognized on other grounds).

———o———

X. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JEFFERY ALAN FOSHEE
JERRY F. BARTLETT
Postsecondary Education Department
4505 Executive Park Drive
Montgomery, AL 36116
(205) 244-7900

RICHARD N. MEADOWS,
JIMMIE ROBERT IPPOLITO, JR.
State Department of Education
State Office Building, Suite 609
501 Dexter Avenue
Montgomery, AL 36130
(205) 261-5320

Attorneys for Respondents Alabama State Board of Education; and Wayne Teague, State Superintendent of Education

No. 87-1200

In The

Supreme Court of the United States

October Term, 1987

BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY; BOARD OF TRUSTEES FOR ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY; JOHN KNIGHT, *et al.*; and NORMALITE ASSOCIATION, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Respondents.

APPENDIX TO RESPONSE OF ALABAMA STATE BOARD OF EDUCATION; AND WAYNE TEAGUE, STATE SUPERINTENDENT OF EDUCATION, RESPONDENTS, TO PETITION FOR WRIT OF CERTIORARI

JEFFERY ALAN FOSHEE
JERRY F. BARTLETT
Postsecondary Education Department
4505 Executive Park Drive
Montgomery, AL 36116
(205) 244-7900

RICHARD N. MEADOWS,
JIMMIE ROBERT IPPOLITO, JR.
State Department of Education
State Office Building, Suite 609
501 Dexter Avenue
Montgomery, AL 36130
(205) 261-5320

Attorneys for Respondents Alabama State Board of Education; and Wayne Teague, State Superintendent of Education

March, 1988

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	CIVIL ACTION
	)	
vs.	)	NO. 83-C-1676-S
	)	
THE STATE OF ALABAMA; et al.	)	(Filed Dec. 19, 1983)
	)	
Defendants	)	

OPINION ON MOTIONS FOR RECUSAL

Auburn University filed an affidavit herein under Title 28 U.S.C. § 144 challenging the propriety of Judge U. W. Clemon to sit as the trial judge in this action.

Following a hearing, Judge Clemon ruled that the affidavit was insufficient and that he was qualified to sit. Auburn filed a petition for a writ of mandamus. The Court of Appeals ruled that the affidavit was legally sufficient and stated that "The affidavit set forth sufficient factual allegations to require that the 'judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings,'" citing *Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98 (Fifth Circuit en banc).

The matter was remanded with directions that another judge be assigned to hear the recusal proceedings.

The Chief Judge of the Court has requested this judge to hear the proceedings.

The Court has held a hearing. The only additional matters tendered upon the hearing were: the petition for writ of mandamus, the responses of Alabama State University, Alabama A&M University and of the United States, the reply memorandum of Auburn, the revised criteria of the Department of Health, Education and Welfare as to acceptable plans to desegregate state systems of public higher education, and compilations of assignments of the various school systems located in the Northern District of Alabama to the several judges of this Court, after the transfer from the Middle District of that part of *Lee v. Macon County* involving those systems. Evidentially speaking, these documents add little to the factual status of the case, or suffer to change the results that might otherwise be reached.

The predecessor of Section 144 was construed in *Berger v. United States*, 255 U.S. 22 (1921), wherein the Court stated:

> "We are of opinion, therefore, that an affidavit . . . upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention; for of what concern is it to a judge to preside in a particular case? of what concern to other parties to have him so preside? and any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term."

Section 455 of Title 28 and Section 144 are to be construed *in parimateria*, *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1052 (5th Cir.

1975). The former section extended the disqualifications from "personal bias or prejudice" (§ 144) "to any proceeding in which the judge's impartiality might reasonably be questioned." (§ 455a). As the court noted in *Parrish*, Section 455a is general "and does not rest on the personal bias and prejudice stricture of Sections 144 and 455(b)(1)."

In *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir.1980), the court stated that the language: "where his impartiality might be reasonably questioned, sets up an objective standard rather than the subjective standard set forth in the prior statute through the use of the phrase 'in his opinion.'" The statute was amended in 1974, omitting the phrase "in his opinion."

In *Potashnick* the court further ruled:

> "Clearly, the goal of the judicial disqualification statute is to foster the appearance of impartiality. Cf.E.Thode, Reporter's Notes to Code of Judicial Conduct 60-61 (1973). This overriding concern with appearances, which also pervades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. As this court has noted, 'the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system.' *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir. 1974). Any question of a judge's impartiality threatens the purity of the judicial process and its institutions.
>
> "Because 28 U.S.C. § 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a

> potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."
>
> "The language of the new statute eliminates the so-called 'duty to sit.' The use of 'might reasonably be questioned' in section 455(a) (emphasis added) clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case."

The 1974 amendment of Section 455 was to bring the statutory grounds for disqualification in conformity with Canon 3c of the Code of Judicial Conduct, the first sentence of which is couched in the identical language as that of Section 455(a).[1]

Judge Clemon commendably acknowledged the standard prescribed in 455(a) and Canon 3c of the Code of Judicial Conduct in his confirmation hearing before the Senate Judiciary Committee (p. 448), when Senator Baucus inquired of him what his attitude would be with respect to a legal matter that would come before him that involved a relative or close friend. He responded:

> "Mr. Clemon. I would think that involving a relative that I should recuse myself in every case, and within the third degree of relationship, should recuse myself with respect to any in-laws who may be involved.

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1. Canon 3c of the Code of Judicial Conduct was adopted by the Judicial Conference of the United States in April 1973. See *Potashnick* footnote 2 at 1108.

Indeed, I would go further than that and say, in any case involving a relative of mine, I would think that I should recuse myself from the case.

In terms of friends, it would depend on the nature of the relationship. If it is a close personal friend of mine, I would think that that would be a situation in which my impartiality might reasonably be questioned, and that in such a case, I should recuse myself.

Indeed, if it is not a close personal friend, but if it is a friendship which might give rise to an appearance of impropriety, I would think that I should recuse myself."

In the memorandum opinion of September 26, 1983, wherein Judge Clemon overruled the motion to disqualify himself, he stated:

"While a reasonable person, reading the affidavits of movants and their counsel and accepting their allegations as true, would certainly harbor doubts as to my impartiality . . . "[2]

Auburn's affidavit sets forth there main grounds for disqualification.

The foremost of these appears to be Judge Clemon's personal relationship with former Senator Stewart. Mr. Stewart is now an attorney of record for the Alabama A&M University, an original defendant herein, but now realigned, by order of Judge Clemon, as a party plaintiff.

---

2. To this statement he added: "[W]hen the true facts and circumstances are known and considered in their totality, such doubts are dispelled." Judge Clemon addressed the Section 455 issue in his initial opinion rendered on September 3, 1983, 571 F.Supp. 958, 962, but reserved a ruling thereon. The September 26, 1983, ruling followed the submission of the Section 455 issue.

The realignment, according to a letter memorandum filed with Judge Clemon on the motion for realignment by Mr. Stewart's firm, was sought "that more forms of relief (e.g. attorney's fees) will be available to it and so that it will have more impact and influence on the action which is brought in large part to benefit A&M." The allowance of attorney's fees for the realigned plaintiff for services for the Stewart firm in the litigation, claim for which is made in A&M's motion for realignment, will be at issue in the case.

Judge Clemon was serving his second term in the Alabama State Senate at the time of his nomination for the judgeship now held by him. During his first four-year term, Mr. Stewart served as a fellow Senator in that body. Judge Clemon was one of four chosen by the two Alabama Senators for nomination out of eighteen recommended by a nominating commission established by the two to fill three vacancies in the Northern District of Alabama and one in the Middle District. Judge Clemon's confirmation met rather formidable opposition before the Judiciary Committee. The hearing was by no means routine as was the case of two of the nominees before the Committee. Senator Stewart appeared before the Committee, recommended Judge Clemon, and actively supported his confirmation during the hearing.

In the course of the hearing Judge Clemon stated that he would think "aspirants for judicial positions should not seek to unduly influence his Senator by making a significant contribution to the campaign." He further stated that (prior to his nomination) he and his wife had early on contributed $500.00 to Mr. Stewart's senate campaign be-

cause he had been his supporter for some time. He also stated that after the race was over and Stewart had accumulated a fairly substantial campaign debt, that he himself had left over compaign funds, and that after obtaining permission from his contributor to transfer the funds, he transferred the funds from his account to Senator Stewart.

The situation presented by these facts goes considerably beyond that presented in *Warner v. Global Natural Resources PLC*, 545 F.Supp. 1298 (S.D. Ohio). In that case Marvin Warner prompted by a call from Senator Metzenbaum called Senator Heflin of the Senate Judiciary Committee and stated that in his opinion Judge Spiegel (the presiding judge in *Warner v. Global*) would make a good judge of the court. Warner had never had any intimate or personal relationship with the judge, who didn't know about the call at the time.

Another ground for recusal presented by the motion involves Section 455(b)(1), which provides that the judge shall disqualify himself (1) "where he has . . . personal knowledge of disputed evidentiary fact concerning the proceedings."

Judge Clemon was counsel of record in *Lee v. Macon County* in the Northern District of Alabama for various plaintiffs and actively participated in certain phases of the case. *Lee v. Macon County* was first instituted in the Middle District. The suit included claims under Title VI of the Civil Rights Act of 1964 against institutions of higher learning, including Alabama A&M University, Florence State University (now the University of North Alabama), Jacksonville State University and Livingston University, all of which institutions are located in the North-

ern District, and all of which are parties in this action. Auburn and certain other institutions of higher learning not administered by the State Board of Education were not parties in the suit.

Lee also included ninety-nine local school systems, the many Trade Schools and Junior Colleges, and the institutions of higher learning set out above, as well as certain other higher educational institutions not located in the Northern District.

Particularly, since the realignment, A&M is waging a common battle with the plaintiffs in *Lee v. Macon County* relating to discrimination in higher education, though not in the same case. *Lee v. Macon County* has had many ramifications and has left its footprints in many records, trial and appellate. For the Court at this juncture to follow its many trials would unduly lengthen this opinion.

In *W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Financial Corporation*, 467 F.Supp. 801 (D.C. Puerto Rico), notwithstanding the fact that another judge had ruled that Judge Torruella was not disqualified, Judge Torruella stated that:

> "[A] reasonable doubt has been raised in this Judge's mind regarding the *possibility* that facts which may have come to his knowledge while acting as labor counsel in a collective bargaining negotiation in 1969, may be 'disputed evidentiary facts concerning [this] proceeding' within the meaning of 28 U.S.C. § 455(b)(1). [Emphasis supplied]
>
> ". . . [W]e believe that such doubt must be resolved in favor of disqualification."

With Judge Clemon's resourcefulness, diligence, and expertise in the legal arena, he would hardly overlook any of the facts and issues in *Lee v. Macon County*.

The other matter presented is that of Judge Clemon's children, as members of a putative class, who would or might be affected by the outcome of the proceedings in this case.

It has been held that a member of a class is a party under Section 455(b)(4) and that a judge related to such party must recuse himself. *In re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982), affirming 515 F.Supp. 1076 (D.C. Ariz.).

There was a motion in this case to intervene by certain persons to assert a class action. However, the motion was later withdrawn. As the Court views the situation, the possible contingency of Judge Clemon's children becoming parties, absent a class action claim in this case, is too remote at this point in time to present a judicial issue meriting relief on this ground.

After considering the entire record and briefs, and applying the statutes and the decisions construing them, the Court is of the opinion, based upon the first two grounds, singularly and in totality, and so holds that the average reasonable person, knowing all the circumstances, would harbor a doubt as to Judge Clemon's impartiality.

The motion is due to be and the same is hereby granted.

The motion of Wayne Teague, as State Superintendent of Education, be and the same is likewise granted,

since it involves the same issues presented for recusal as those presented by Auburn's motion.

Done this 19th day of December, 1983.

/s/ H. H. Grooms
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

UNITED STATES OF AMERICA, et al., Defendants.	)	NO. CV 83-C-1676-S
vs.	)	
THE STATE OF ALABAMA, et al., Defendants.	)	(Filed January 19, 1984)

RECUSAL

The undersigned hereby recuses himself from further participation as a judge herein.

This the 19th day of January, 1984.

/s/ H. H. Grooms

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	NO. CV 83-C-1676-S
THE STATE OF ALABAMA, et al., Defendants.	)	(Filed January 19, 1984)

Order Granting Motion for Rehearing

After carefully considering the many documents filed herein, including motions to intervene and briefs, the undersigned has reached the conclusion that it is in the best interest of all concerned that further proceedings related to the recusal of the Honorable U. W. Clemon, other than entry of this order, be conducted by another judge, one who is not a member of this court. In order to afford another judge a clear slate upon which to write, the court is of the opinion that the motions for a new trial filed herein by Alabama A & M University and Honorable U. W. Clemon, be and each of them are hereby GRANTED, and the Opinion and Order of December 19, 1983, be and the same is hereby VACATED.

This the 19th day of January, 1984.

/s/ H. H. Grooms

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CASE NO. CV-83-C-1676-S
THE STATE OF ALABAMA, et al., Defendants.	)	(Filed August 5, 19—)

MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion, defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia*, that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in

January, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama State University as the most equitable and effective method to disestablish the racially duel system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth herein, enter an Order, pursuant to and in accordance with Federal Rules of Civil Procedure, Rules 20 and 21, realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,

GRAY, SEAY & LANGFORD

By:/s/ SOLOMON S. SEAY, JR.
Solomon S. Seay, Jr.
352 Dexter Avenue
Montgomery, Alabama 36104
(205) 269-2563

Attorney for Board of Trustees for
Alabama State University

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF upon the following persons by placing copies of same in the United States Mail, first-class postage prepaid, on this the 3rd day of August, 1983:

Ira Dement
Dement & Wise
P. O. Box 4163
Montgomery, AL 36101

FOR: George C. Wallace
The Alabama Commission
on Higher Education
The State of Alabama
The Alabama Public School
and College Authority

Glenn Powell
P. O. Box 295
Tuscaloosa, AL 35401
and

FOR: The University
of Alabama

Paul Skidmore
P. O. Box 6233
University, AL 35486

Charles Coody
Assistant Attorney General
Department of Education
State of Alabama
Montgomery, AL 36130

FOR: Wayne Teague
Alabama State Board
of Education

Thomas Thagard
P. O. Box 78
Montgomery, AL 36101
and
Edward Allen
Balch, Bingham, Baker, Ward,
Smith, Bowman & Thagard
P. O. Box 306
Birmingham, AL 35201

FOR: Auburn University

Walter Merrill
500 First National Bank
Building
Anniston, AL 36201

FOR: Jacksonville State
University

J. Frederic Ingram
William F. Murray, Jr.
Thomas, Taliaferro, Forman,
Burr & Murray
1600 Bank for Savings Bldg.
Birmingham, AL 35203

FOR: Livingston University

Joe R. Whatley, Jr.
Donald W. Stewart
Stewart, Falkenberry &
Whatley
Suite 305
2100 16th Avenue South
Birmingham, AL 35203

FOR: Alabama A&M
University

Richard F. Calhoun
P. O. Box 965
Troy, AL 36081

FOR: Troy State University

Frank Ellis, Jr.
P. O. Box 587
Columbiana, AL 35051

FOR: The University of
Montevallo

Robert Potts
107 East College Street
Florence, AL 35630

FOR: The University of
North Alabama

Maxey Roberts
The University of
South Alabama
Mobile, AL 36688

FOR: The University of
South Alabama

William Bradford Reynolds
Assistant Attorney General
Tenth and Constitution Avenue
Washington, D.C. 20530

Frank W. Donaldson
United States Attorney
Federal Courthouse
1800 5th Avenue North
Birmingham, AL 35203

Thomas M. Keeling
Harvey L. Handley, III
Jay P. Heubert
General Litigation Section
Civil Rights Division
Department of Justice
Washington, D.C. 20530

/s/ Solomon S. Seay, Jr.

EXHIBIT 1

POLICY ON UNIVERSITY DESEGREGATION

WHEREAS, the U. S. Department of Education, Office of Civil Rights, has notified Governor Fob James that the State of Alabama has failed to eliminate vestiges of the former *de jure* racially dual system of higher education, and

WHEREAS, the State is given a limited time in which to submit to the Department a statewide desegregation plan; and

WHEREAS, any such plan would involve Alabama State University.

BE IT THEREFORE RESOLVED, That the Board of Trustees for Alabama State University reaffirm the po-

sition that the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan as is now provided under the statutes of Alabama (H. B. 494, Act 79-461).

BE IT ALSO RESOLVED, That the Board focuses attention on its status as the only Montgomery-based university governance body established under Alabama statutes and calls upon the Legislature and the Governor for such additional powers and duties as would be necessary for management and control of all higher education offerings in the event of change in the governance of the Montgomery branches of Auburn University and Troy State to accommodate any plan for further desegregation, academic or economic improvement.

BE IT FURTHER RESOLVED, That in event of consolidation or merger and/or any change of identity involving Alabama State and the Montgomery branches of Auburn University and Troy State, the Board hereby calls upon the Legislature and the Governor to safeguard and preserve the name "ALABAMA STATE UNIVERSITY."

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CV 83-C-1676-S
STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama, et al., Defendants.	)	

MOTION OF REALIGNED PARTY-PLAINTIFF BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR LEAVE TO FILE AMENDED CLAIMS

Realigned Party-Plaintiff Board of Trustees for Alabama State University ("ASU") moves for leave to file the attached Amended Claims, based on the following:

1. The attached Amended Claims more specifically state claims which are subsumed within the more general allegations of the Complaint of the United States, which was adopted by ASU in its motion for realignment, as well as claims which have been raised by the Complaint in Intervention of John F. Knight, et al.

2. These Amended Claims are further prompted by recent developments and new requirements that had been proposed by the Defendant State Board of Education regarding eligibility of students for admission in teacher education programs, recommendations that certain teacher

education programs at ASU not be approved because of racially discriminatory faculty requirements, and the State Board's racially discriminatory administration of scholarship and student loan funds.

3. These Amended Claims should not cause a delay in any ultimate trial date in this matter.

Respectfully submitted this 21st day of November, 1984.

SEAY & DAVIS
731 Carter Hill Road
P. O. Box 6215
Montgomery, Alabama 36106

BY: /s/ Solomon S. Seay
SOLOMON S. SEAY
TERRY DAVIS

Attorneys for Realigned Plaintiffs
Alabama State University

CERFITICATE OF SERVICE

I do hereby certify that on this 21st day of November, 1984, a copy of the foregoing pleading was served upon counsel of record:

Ira De Ment, Esq.

Ronald W. Wise, Esq.
De Ment and Wise
555 South Perry St.
P. O. Box 4163
Montgomery, AL 36106

James J. Carter, Esq.
Attorney at Law
P. O. Box 116
Montgomery, AL 36195

John R. Carrigan, Esq.
Attorney at Law
P. O. Box 306
Birmingham, AL 35201

James U. Blacksher, Esq.

Larry T. Menefee, Esq.
Blacksher, Menefee
& Stein, P.A.
405 Van Antwerp Building
P. O. Box 1051
Mobile, AL 36633

Thomas D. Samford, III, Esq.
Samford & Samford
P. O. Box 550
Opelika, AL 36801

Charles Coody, Esq.
State Dept. of Education
609 State Office Building
Montgomery, AL 36130

Thomas W. Thagard, Esq.
Attorney at Law
P. O. Box 78
Montgomery, AL 36101

Glenn C. Powell, Esq.
Attorney at Law
P. O. Box 295
Tuscaloosa, AL 35401

Richard Calhoun, Esq.
P. O. Box 965
Troy, AL 36081

Demetrius C. Newton, Esq.
Attorney at Law
Suite 1722
2121 8th Ave., North
Birmingham, AL 35203

Frank C. Ellis, Jr., Esq.
Attorney at Law
P. O. Box 587
Columbiana, AL 35051

Frank W. Donaldson, Esq.
Caryl P. Privett, Esq.
U. S. Attorney Office
200 Federal Courthouse
Montgomery, AL 36104

T. Michael Putnam, Esq.
107 East College Street
Florence, AL 35630

Joe R. Whatley, Jr., Esq.
John Falkenberry, Esq.
Suite 305
2100 16th Ave., S.
Birmingham, AL 35205

Maxey Roberts, Esq.
University Attorney Office
308 University Blvd.
Mobile, AL 36688

Thomas M. Todd, Esq.
Attorney at Law
1 North La Salle
Chicago, IL 60602

J. Frederic Ingram, Esq.
Attorney at Law
1600 Bank for Savings Bldg.
Birmingham, AL 35203

J. Richmond Pearson, Esq.
809 Bolin St., S.W.
Birmingham, AL 35211

Edward S. Allen, Esq.
Balch, Bingham, Baker, Ward,
Smith, Bowman & Thagard
P. O. Box 306
Montgomery, AL 35201

Thomas H. Keeling, Esq.
Franz Marshall, Esq.
Laverne Younger
Department of Justice
General Litigation Section
Civil Litigation Section
Washington, D.C. 20530

by depositing same in the United States mail, postage prepaid.

/s/ Solomon S. Seay, Jr.
ATTORNEY FOR PLAINTIFFS

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DISTRICT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CV 83-C-1676-S
	)	
STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama, et al.	)	
	)	
Defendants.	)	

AMENDED CLAIMS OF REALIGNED PARTY-PLAINTIFF BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY

Realigned party-plaintiff Board of Trustees for Alabama State University ("ASU") hereby files the following amended claims:

Jurisdiction

1. ASU hereby adopts paragraph 1 of the Knight Intervenors' Complaint.

Allegations of Fact

2. ASU adopts paragraph 14-33 of the Knight Intervenors' Complaint.

3. The defendant State Board of Education requires that students seeking admission to teacher education pro-

grams achieve a score of at least 16 on the American College Testing program (the ACT) taken prior to entering the teacher education program, or achieve an equivalent score on another standardized test approved by the defendant State Board of Education taken at the end of the sophomore year. This formal test score requirement for admission to teacher education programs has a severe, adverse racial impact on black students and, correspondingly, on traditionally black institutions, including ASU.

4. The defendant State Board of Education instituted its formal test score requirements for entry into teacher education programs in 1972 with full knowledge that it would disqualify nearly half of the students who were previously admitted to teacher education programs and that most of those disqualified would be black students.

5. Evidence of the adverse racial impact of the State Board's test requirement for entry in teacher education programs (the "ACT-16 requirement") can be seen in the rapidly declining numbers of students who have been enrolling in teacher education programs at the traditionally black institutions of higher education in Alabama. The number of ASU students enrolling in teacher education programs in 1983-84 dropped to less than half the number who were enrolling in 1979-80.

6. By contrast, the State Boards ACT-16 requirement for entry into teacher education programs has little effect on most of the traditionally white institutions, many which, like Auburn University, already restrict enrollment to entering freshmen with ACT scores of 18 or higher.

7. ACT's publisher warns colleges that students who, for a variety of reasons, are educationally disadvantaged will score lower on the ACT, and that the educationally disadvantaged are comprised predominantly of minority students. Information obtained through discovery in this action confirms that the average ACT scores of black students entering institutions of higher education in Alabama are substantially lower than those of white students and lower than the minimum 16-score required by the defendant State Board for entry into teacher education programs:

a. For example, the mean (average) composite ACT scores for Auburn University, main campus show:

Academic Year	White Students* Mean (Average) Score	White Students* Dist. of Scores (Range)	Black Students Mean (Average) Score	Black Students Dist. of Scores (Range)
1970-71	23.4	14-33	18.4	14-24
1975-76	22.6	12-33	17.9	11-26
1980-81	22.3	12-33	19.1	8-29
1983-84	22.8	12-34	20.1	16-29

*All non-black freshman students. Includes Asians, foreign nationals, Hispanics, native Americans, and white students.

b. At the University of North Alabama, the mean and median scores for 1983-84 first-time freshman were:

	Mean	Median
Black	11.88	11
White	11.72	18

c. The mean ACT scores for entering freshmen at the University of South Alabama are:

	Black	White
1969-70	15.0	20.9
1970-71	15.2	20.5
1971-72	13.5	20.7
1972-73	15.3	20.7
1973-74	14.5	20.6
1974-75	14.9	21.6
1975-76	16.9	21.1
1976-77	16.7	21.9
1977-78	16.9	20.8
1978-79	16.9	20.6
1979-80	17.0	20.8
1980-81	16.7	20.6
1981-82	16.2	20.4
1982-83	15.5	20.3
1983-84	16.2	20.2

d. The average ACT score among the University of South Alabama's black students is 17.1. The national average is 12.6.

e. In 1977, the University of South Alabama's admissions policy stated "students with ACT scores of less than 16 or SAT combined scores of less than 800 are rarely admitted." The efficacy of this policy can be seen in the rising mean ACT scores for black entering freshmen since the policy went into effect.

8. The ACT has never been validated as a reliable predictor of whether Alabama students will perform successfully in teacher education programs.

9. The publisher of the ACT also admonishes colleges using test results that students who are educationally disadvantaged and who score lower on the ACT may nevertheless be fully capable of performing satisfactorily at the college level if they are provided special assistance. An institution that is willing and able to assist educationally disadvantaged students is advised to select more such students than would be indicated by test scores, and the publisher recommends that all students be selected with appropriate attention given to qualifications in addition to test scores.

10. ASU has always accepted as part of its mission the need to provide an opportunity to educationally disadvantaged students to acquire the skills that will enable them to perform satisfactorily at the college level. Other institutions, such as Auburn, the University of Alabama and the University of South Alabama, have failed or refused to share the burden of helping educationally disadvantaged students overcome their developmental problems and have restricted admission to students who score higher on the ACT. Consequently, the defendant State Board's ACT-16 requirement uniquely disadvantages ASU and other institutions who are attempting to provide a full and equal opportunity to all students in Alabama, particularly to minority students who have been the victims of racial discrimination at the elementary-secondary level.

11. An advisory committee appointed by the defendant State Board recommended that teacher education pro-

gram admission requirements be increased even further at all levels. ASU alleges, on information and belief, that the defendant State Board will consider a resolution to increase from 16 to 18 the minimum ACT score required for admission to teacher education programs at its February 1985 meeting. Such action taken will aggravate the discrimination already being practiced against black students and traditionally black institutions and will further cripple the ability of traditionally black institutions to provide equal educational opportunity to all students who are or who may become capable of performing successfully at the college level.

12. Exercising its authority under *Ala. Code.* Sec. 16-23-14 (1975), the defendant State Board has also prescribed minimum requirements for faculty members in programs for instructional support personnel. Approval of an institution's teacher education program is contingent upon meeting these requirements which include the following:

a. That they hold an earned doctorate, or the equivalent, with a major emphasis in the field of specialization in which the major workload is assigned;

b. That they have a minimum of three years of successful experience as a practitioner in the instructional support area in which the major workload is assigned;

c. That at least one faculty member in each instructional support area in which a program leading to certification is offered shall hold an earned doctorate with an area of specialization in that field.

13. In May 1984, a review team appointed by the defendant State Superintendent of Education recommended

that no students be admitted to the following programs at ASU because faculty members in these programs did not meet some or all of the aforegoing faculty requirements:

a. The Class A and Class AA Superintendent Program: of the two faculty members in this program at ASU, both have the appropriate doctorates, but neither has three years experience as superintendent. One faculty member with an appropriate degree and three years of experience as a superintendent is required for the Class A program; two such faculty members are required for the Class AA program.

b. The Class A and Class AA General Supervisor Program: of the two faculty members in this program at ASU, both lack the required doctoral level preparation in supervision, and both lack the three years of experience as a supervisor. One faculty member with appropriate preparation and experience is required for the Class A program; two such faculty members are required for the Class AA program.

c. The Class A and Class AA Reading Supervisor Program: of the two faculty members in this program at ASU, both have the required doctoral level preparation, but neither has three years of experience as a reading supervisor. One faculty member with appropriate doctoral level preparation and three years of experience as a reading supervisor is required for the Class A program; two such faculty members are required for the Class AA program.

d. The Class A and Class AA Library Media Program: the one faculty member in this program at ASU is fully qualified, but State Board regulations require a

minimum of two faculty members meeting the aforesaid requirements for the Class A program. No additional faculty member is required for the Class AA program.

14. The State Board's requirements for faculty in programs for instructional support personnel and the recommendations of the May 1984 review team at ASU have an adverse racial impact on black students and traditionally black institutions, including ASU, and they perpetuate the vestiges of the prior *de jure* system of racial segregation at all levels of public education in Alabama. Because of historical segregation and racial discrimination against black students and black professionals, there are disproportionately few black educators who can satisfy faculty requirements for instructional support personnel programs, namely, three years experience as a superintendent, supervisor, reading supervisor or supervisor of library media and doctoral level preparation in those specific fields of specialization.

15. The faculty requirements for instructional support personnel programs are not necessary for the successful operation of such programs or for the successful preparation of students in those programs.

16. The requirements for faculty in instructional support personnel programs have both the purpose and the effect of discriminating against black students, black professionals and traditionally black institutions.

17. The Alabama Legislature has appropriated monies to be distributed by the State Department of Education to Alabama students as academic scholarships and loans at institutions of higher education. The defendants have administered this scholarship fund in a racially discriminatory manner.

18. Since the Legislature appropriated the scholarship funds, all the scholarships have been awarded to white students and none awarded to a black student, even though many black students applied.

19. Defendants' administration of the scholarship and loan authorized by the Alabama Legislature has both the purpose and effect of discriminating against black students and traditionally black institutions, including ASU.

First Federal Cause of Action

20. ASU hereby adopts paragraphs 34 and 35 of the Knight Intervenors' Complaint.

Second Federal Cause of Action

21. ASU hereby adopts paragraph 36 of the *Knight* Intervenors' Complaint.

Third Federal Cause of Action

22. The defendant State Board's ACT-16 requirement for entry into teacher education programs violates the rights of ASU and the black students ASU serves guaranteed by Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d, for the following reasons:

a. Most of the black students seeking admission to the teacher education program at ASU have been denied an equal opportunity for quality education by elementary-secondary school systems of the defendant State of Alabama, many of which continue to perpetuate the vestiges of the *de jure* segregated system and have not achieved unitary status.

b. Defendants cannot demonstrate that the disproprotionately lower scores achieved by blacks on the ACT are not due to the present effects of past intentional and/or *de jure* segregation at all levels of public education in Alabama, elementary, secondary and higher education.

c. Defendants cannot demonstrate that the ACT-16 requirement is necessary to remedy the continued effects of *de jure* segregation.

d. Defendants have not eliminated the vestiges of *de jure* segregation in Alabama's system of higher education, and the transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students or traditionally black institutions of higher education by reducing the educational opportunities currently available to blacks.

Fourth Federal Cause of Action

23. For the reasons set out in the preceding paragraph, defendants' ACT-16 requirement for entry into teacher education programs violates the rights of ASU and the students ASU seeks to serve guaranteed by the Equal Educational Opportunities Act, 20 U.S.C. Sec. 1703.

Fifth Federal Cause of Action

24. For the reasons set out in paragraph 14 *supra*, the defendants' ACT-16 requirement for entry into teacher education programs violates the fourteenth amendment of the United States Constitution. The ACT-16 requirement also violates the fourteenth amendment for the following reasons:

a. The defendants initiated and maintain the ACT-16 requirement for racially discriminatory purposes.

b. The ACT-16 requirement is arbitrary and capricious and does not achieve a legitimate state interest.

c. The ACT has not been validated for the manner in which it is used under the defendants' ACT-16 requirement for entry into teacher education programs, and defendants cannot establish that the ACT is a fair test of what has in fact been taught in the elementary-secondary public school systems of Alabama. For these reasons, the ACT-16 requirement is fundamentally unfair.

Sixth Federal Cause of Action

25. The defendant State Board's faculty requirements for instructional support personnel programs violate the rights of ASU, the black students ASU serves and black professionals employed by ASU that are guaranteed by Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(d) for the following reasons:

a. Because of historical and continuing racial discrimination in public education in Alabama, disproportionately few black professionals have had the opportunity to obtain both the prior experience and field of specialization requirements set out in the State Board regulations.

b. Defendants cannot demonstrate that faculty grams are necessary to achieve the purposes to which they have been enacted.

c. Defendants cannot demonstrate that the faculty requirements for instructional support personnel programs are necessary to remedy the continued effects of *de jure* segregation.

d. Defendants have not eliminated the vestiges of *de jure* segregation in Alabama's system of higher education, and the transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students or upon traditionally black institutions of higher education by reducing the educational opportunities currently available to blacks.

Seventh Federal Cause of Action

26. For the reasons set out in the preceding paragraph, defendants' faculty requirements for instructional support personnel programs violate the rights of ASU, the students ASU seeks to serve, and the black professionals ASU employs, that are guaranteed by the Equal Educational Opportunities Act. 200 U.S.C. Sec. 1703.

Eighth Federal Cause of Action

27. For the reasons set out in paragraph 25, *supra*, and because they have a racially discriminatory purpose, the defendants' minimum faculty requirements for instructional support personnel programs violate the fourteenth amendment to the United States Constitution.

Ninth Federal Cause of Action

28. The defendants' administration of the monies allocated by the Alabama Legislature for scholarships and loans discriminates on the basis of race against ASU and the black students ASU seeks to serve, in violation of their rights under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000(d); the Equal Educational Opportunities Act, 20 U.S.C. Sec. 1703, and the fourteenth amendment to the United States Constitution.

First State Cause of Action

29. ASU hereby adopts paragraphs 37-39 of the *Knight* Intervenors' Complaint.

Prayer for Relief

30. ASU hereby adopts paragraphs 40-42 in the Prayer for Relief set out in the Knight Intervenors' Complaint.

31. ASU further prays the Court will grant a declaratory judgment that the defendants' ACT-16 requirement for entry into teacher education programs, the defendants' minimum faculty requirements for instructional support personnel programs and the defendants' administration of appropriated scholarship and loan funds violate the federal statutory and constitutional rights of ASU, the black students it seeks to serve, and black professionals employed by ASU.

32. ASU further prays the Court will enter preliminary and permanent injunctions enjoining the defendants, their agents, attorneys, employees, successors and those acting in concert with them or at their direction from:

a. Continuing to enforce the ACT-16 requirement, and

b. Continuing to enforce the minimum faculty requirements for instructional support personnel programs.

c. Continuing to administer scholarship and loan funds in a racially discriminatory manner, and

d. From failing to provide make-whole relief to ASU and all the black students who have been injured in

the past by the unlawful and unconstitutional ACT-16 requirement.

Respectfully submitted this 21st day of November, 1984.

SEAY & DAVIS
732 Carter Hill Road
P. O. Box 6215
Montgomery, Alabama 36106

By: Solomon S. Seay, Jr.
SOLOMON S. SEAY
TERRY DAVIS
Attorneys for Realigned Plaintiffs
Alabama State University

CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of November, 1984, a copy of the foregoing pleading was served upon counsel of record:

Ira De Ment, Esq.
Ronald W. Wise, Esq.
De Ment and Wise
555 South Perry St.
P. O. Box 4163
Montgomery, AL 36104

James J. Carter, Esq.
Attorney at Law
P. O. Box 116
Montgomery, AL 36195

John R. Carrigan, Esq.
Attorney at Law
P. O. Box 306
Birmingham, AL 35201

Thomas W. Thagard, Esq.
Attorney at Law
P. O. Box 78
Montgomery, AL 36101

James U. Blacksher, Esq.
Larry T. Menefee, Esq.
Blacksher, Menefee
& Stein, P.A.
405 Van Antwerp Building
P. O. Box 1051
Mobile, AL 36633

Thomas D. Samford, III, Esq.
Samford & Samford
P. O. Box 550
Opelika, AL 36801

Charles Coody, Esq.
State Dept. of Education
609 State Office Building
Montgomery, AL 36130

Joe R. Whatley, Jr., Esq.
John Falkenberry, Jr. Esq.
Suite 305
2100 16th Ave., S.
Birmingham, AL 35205

Glenn C. Powell, Esq.
Attorney at Law
P. O. Box 295
Tuscaloosa, AL 35401

Richard Calhoun, Esq.
P. O. Box 965
Troy, AL 36081

Demetrius C. Newton, Esq.
Attorney at Law
Suite 1722
2121 8th Ave., North
Birmingham, AL 35203

Frank C. Ellis, Jr., Esq.
Attorney at Law
P. O. Box 587
Columbiana, AL 35051

Frank W. Donaldson, Esq.
Caryl P. Privett, Esq.
U. S. Attorney Office
200 Federal Courthouse
Montgomery, AL 36104

T. Michael Putnam, Esq.
107 East College Street
Florence, AL 35630

Maxey Roberts, Esquire
University Attorney Office
308 University Blvd.
Mobile, AL 36688

Thomas M. Todd, Esq.
Attorney at Law
1 North La Salle
Chicago, IL 60602

J. Frederic Ingram, Esq.
Attorney at Law
1600 Bank for Savings Bldg.
Birmingham, AL 35203

J. Richmond Pearson, Esq.
809 Bolin St., S.W.
Birmingham, AL 35211

Edward S. Allen, Esq.
Balch, Bingham, Baker, Ward,
Smith, Bowman & Thagard
P. O. Box 306
Montgomery, AL 35201

Thomas H. Keeling, Esq.
Franz Marshall, Esq.
Laverne Younger
Department of Justice
General Litigation Section
Civil Litigation Section
Washington, D.C. 20530

by depositing same in the United States mail, postage prepaid.

SOLOMON S. SEAY, JR.
Attorney for Plaintiffs

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CASE NO. CV 83-C-1676-S
v.	)	
THE STATE OF ALABAMA, et al.,	)	(Filed July 26, 1983)
Defendants	)	

MOTION TO REALIGN OR IN THE ALTERNATIVE FOR LEAVE TO FILE CROSS CLAIMS

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M") hereby moves to be realigned and treated as a party-plaintiff based on the following:

1. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, it has been denied its fair share of the capital and operation funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount, to enhance Alabama A & M so that it can attract more students of all races.

2. Likewise, the allegations of the Second Claim demonstrate discrimination against and damage to Alabama A & M. The University of Alabama in Huntsville (hereinafter "UAH") was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant functions, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory treatment, the Court should order that Alabama A & M be given control of all land grant functions in North Alabama, while leaving Auburn with those functions in South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

3. The claims of Alabama A & M are brought under 41 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution with subject matter jurisdiction under U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* In addition to the relief requested herein

and the original Complaint, Alabama A & M requests the award of attorney's fees and such other relief as may be appropriate.

4. Alternatively, Alabama A & M moves for leave to file the cross claims attached hereto.

Respectfully submitted,

STEWART, FALKENBERRY & WHATLEY
Suite 305, 2100 16th Avenue South
Birmingham, AL 35205
(205) 933-0300

By: /s/ Joe R. Whatley, Jr.
By: /s/ Donald W. Stewart

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion has been served on the following by depositing same in the U.S. Mail, postage prepaid, on this 25 day of July, 1983:

Ira Dement, Esquire
Dement & Wise
P. O. Box 4163
Montgomery, AL 36101

For: George C. Wallace
The Alabama Commission on Higher Education
The State of Alabama
The Alabama Public School and College Authority

Glenn Powell, Esquire
P. O. Box 295
Tuscaloosa, AL 35401

For: The University of Alabama

Charles Coody, Esquire
Assistant Attorney General
Department of Education
State of Alabama
Montgomery, AL 36130

For: Wayne Teague
Alabama State Board
of Education

Solomon Seay, Jr., Esquire
Gray, Seay & Lanford
352 Dexter Avenue
Montgomery, AL 36104

For: The Board of Trustees
for Alabama State
University

Thomas Thagard, Esquire
P. O. Box 78
Montgomery, AL 36101

For: Auburn University

Walter Merrill, Esquire
500 1st National Bank Bldg.
Anniston, AL 36201

For: Jacksonville State
University

Fred Ingram, Esquire
Thomas, Taliaferro, Forman,
Burr & Murray
1600 Bank for Savings Bldg.
Birmingham, AL 35203

For: Livingston University

Richard F. Calhoun, Esquire
P. O. Box 965
Troy, AL 36081

For: Troy State University

Frank Ellis, Jr., Esquire
P. O. Box 587
Columbiana, AL 35051

For: The University of
Montevallo

Robert Potts, Esquire
107 East College Street
Florence, AL 35630

For: The University of
North Alabama

Maxey Roberts, Esquire
The University of
South Alabama
Mobile, AL 36688

For: The University of
South Alabama

William Bradford Reynolds
Assistant Attorney General
Tenth and Constitution Avenue
Washington, D.C. 20530

Frank W. Donaldson
United States Attorney
Federal Courthouse
1800 5th Avenue North
Birmingham, AL 25303

Thomas M. Keeling
Harvey L. Handley, III
Jay P. Heubert
General Litigation Section
Civil Rights Division
Department of Justice
Washington, D.C. 20530

/s/ Joe R. Whatley, Jr
Joe R. Whatley, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
v.	)	CASE NO. CV 83-C-1676-S
THE STATE OF ALABAMA, et al.,	)	
Defendants	)	

CROSS CLAIMS

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M") hereby files the following cross claims:

1. These claims are filed pursuant to the ancillary jurisdiction of this Court. These claims are also brought under 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution, with subject matter jurisdiction being based on 28 U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

2. Each and every allegation, claim, and request for relief in the original complaint are hereby realleged and incorporated herein by reference.

3. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, Alabama A & M has been denied its fair share of the capital and operational funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount, to enhance Alabama A & M so that it can attract more students of all races.

4. Likewise, the allegations in the Second Claim of the original Complaint demonstrate discrimination against and damage to Alabama A & M. UAH was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant function, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory

treatment, the Court should order that Alabama A & M be given control of all land grant functions for North Alabama, while leaving Auburn with those functions for South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

5. These cross claims are brought against all other defendants to this action.

WHEREFORE, Alabama A & M request that the Court order the relief requested in the original Compliant, the relief requested in the body of this complaint, an award of attorney's fees and costs, and such other relief as the Court may consider appropriate.

Respectfully submitted,

STEWART, FALKENBERRY & WHATLEY
Suite 305, 2100 16th Avenue South
Birmingham, AL 35205
(205) 933-0300

By: /s/ Joe R. Whatley, Jr.
By: /s/ Donald W. Stewart

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing instrument has been served on the following by depositing same in the U.S. Mail, postage prepaid, on this 25th day of July, 1983:

Ira Dement, Esquire
Dement & Wise
P. O. Box 4163
Montgomery, AL 36101

For: George C. Wallace
The Alabama Commission on Higher Education
The State of Alabama
The Alabama Public School and College Authority

Glenn Powell, Esquire P. O. Box 295 Tuscaloosa, AL 35401	For: The University of Alabama
Charles Coody, Esquire Assistant Attorney General Department of Education State of Alabama Montgomery, AL 36130	For: Wayne Teague Alabama State Board of Education
Solomon, Seay, Jr., Esquire Gray, Seay & Langford 352 Dexter Avenue Montgomery, AL 36104	For: The Board of Trustees for Alabama State University
Thomas Thagard, Esquire P. O. Box 78 Montgomery, AL 36101	For: Auburn University
Walter Merrill, Esquire 500 1st National Bank Bldg. Anniston, AL 36201	For: Jacksonville State University
Fred Ingram, Esquire Thomas, Taliaferro, Forman, Burr & Murray 1600 Bank for Savings Bldg. Birmingham, AL 35203	For: Livingston University
Richard F. Calhoun, Esquire P. O. Box 965 Troy, AL 36081	For: Troy State University
Frank Ellis, Jr., Esquire P. O. Box 587 Columbiana, AL 35051	For: The University of Montevallo
Robert Potts, Esquire 107 East College Street Florence, AL 35630	For: The University of North Alabama
Maxey Roberts, Esquire The University of South Alabama Mobile, AL 36688	For: The University of South Alabama
William Bradford Reynolds Assistant Attorney General Tenth and Constitution Avenue Washington, D.C. 20530	

Frank W. Donaldson
United States Attorney
Federal Courthouse
1800 5th Avenue North
Birmingham, AL 35203

Thomas M. Keeling
Harvey L. Handley, III
Jay P. Heubert
General Litigation Section
Civil Rights Division
Department of Justice
Washington, D.C. 20530

/s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff	)	
v.	)	CASE NO.
THE STATE OF ALABAMA, et al., Defendants	)	CV 83-C-1676-S

AMENDED CLAIMS

The Board of Trustees for Alabama A & M University hereby files the following amended claims:

1. These claims are filed pursuant to the ancillary jurisdiction of this Court. Subject matter jurisdiction also is based on 28 U.S.C. § 1343, in addition to the statutes cited in the specific claims described herein. In addition to asserting claims against defendants in the above styled action, A & M is asserting its Tenth and Eleventh Claims against the United States of America.

2. The following abbreviations will be used throughout these claims:

a) "State" refers to The State of Alabama;

b) "Board" refers to The Alabama State Board of Education;

c) "A & M" refers to the Board of Trustees for Alabama A & M University;

d) "ASU" refers to The Board of Trustees for Alabama State University;

e) "Auburn" refers to Auburn University;

f) "AUM" refers to Auburn University in Montgomery;

g) "JSU" refers to Jacksonville State University;

h) "LU" refers to Livingston University;

i) "TSU" refers to Troy State University;

j) "TSUM" refers to Troy State University in Montgomery;

k) "UM" refers to The University of Montevallo;

l) "UA" refers to The Board of Trustees for the University of Alabama;

m) "UAH" refers to the University of Alabama in Huntsville;

n) "UAB" refers to The University of Alabama in Birmington;

o) "UNA" refers to The University of North Alabama;

p) "USA" refers to The University of South Alabama;

q) "ACHE" refers to The Alabama Commission on Higher Education; and

r) Where the context indicates, the use of an abbreviation for a university may refer to its main or oldest campus. For example, UA may refer to the University of Alabama in Tuscaloosa.

3. Each and every allegation, claim, and request for relief in the original complaint are realleged and incorporated herein by reference.

4. The additional defendants added by these claims are R. C. Bamberg, Robert H. Harris, Michael B. McCartney, Bill Nichols, John W. Pace, III, Frank P. Samford, Jr., Morris Savage, John Denson, Charles M. Smith, III, and Henry B. Stegall, II, in their official capacities as members of the Board of Trustees of Auburn University, a public corporation; T. Massey Bedsole, O. H. Delchamps, Jr., Aaron M. Aronov, Winston M. Blount, Yetta G. Samford, Jr., Cleophus Thomas, Jr., Garry Neil Drummond, John T. Oliver, William H. Mitchell, Martha H. Simms, Frank H. Brombey, Jr., Thomas E. Rast, Samuel Earle G. Hobbs, Sandra Hullett, Ernest G. Williams in their official capacity as members of the Board of Trustees of the University of Alabama; Thomas Braswell in his official capacity as comptroller of the State of Alabama and as comptroller of the Alabama Special Education Trust Fund: he is the official responsible for disbursing the State funds described herein.

5. In 1862, Congress enacted the First Morrill Act, 12 Stat. 503 *et seq.*, 7 U.S.C. § 301 *et seq.*, providing grants of land to state for endowments to establish at least one college of agricultural and mechanic arts. On December 31, 1868, the State of Alabama accepted the appropriation under the First Morrill Act, and on or about February 26, 1872, the Legislature of the State of Alabama authorized an agricultural and mechanical college at Auburn. This agricultural and mechanical college was the predecessor to Auburn. Auburn, but not A & M, is recognized in the Constitution of the State of Alabama, Amendment No. 161, which replaced § 266 of the 1901 Constitution. Under § 266 and Amendment No. 161, the Legislature has recog-

nized that "the trustees . . . and their successors in office, are constituted a body corporate under the name of Auburn University, to carry into effect the purposes and intent of the congress of the United States in the grants of land by the act of July 2, 1862." Code of Alabama 1975 § 16-48-1. The Alabama Constitution of 1901 was adopted in large part for racially discriminatory reasons.

6. In 1890, Congress enacted the Second Morrill Act, 26 Stat. 417 *et seq.*, 7 U.S.C. § 321 *et seq.* The Second Morrill Act authorized the establishment of separate land grant colleges for Blacks. Section one of the Second Morrill Act contained the following provision:

> *No money shall be paid out* under this act to any State . . . for the support and maintenance of a college *where a distinction of race or color is made in the admission of students*, but the *establishment and maintenance of such colleges separately for white and colored students* shall be held in compliance with the provisions of this act if the funds received in such State . . . be equitably divided as hereinafter set forth: *Provided*, That in any State in which there has been one college established in pursuance of the act of July second, 1862, and also in which an educational institution of like character has been established, or may be hereafter established, . . . for the education of colored students in agriculture and the mechanic arts, . . . or whether or not it has received money heretofore under the [1862] act to which this act is an amendment, the legislature of such State *may propose and report to the Secretary of the Interior a just and equitable division of the fund* to be received under this act between one college for white students and one institution for colored students established as aforesaid, which shall be divided into two parts and paid accordingly, and thereupon such institution for colored students shall be entitled to

> the benefits of this act and subject to its provisions, *as much as it would have been if it had been included under the act of 1862*, and the fulfillment of the foregoing provisions shall be taken as a compliance with the provision in reference to separate colleges for white and colored students. (Emp. Supp.)

This language is contained with only changes for purposes of codification in 7 U.S.C. § 323. Section 4 of the Second Morrill Act also provided that "the Secretary of the Interior shall ascertain and certify to the Secretary of the Treasury as to each state whether it is entitled to receive its share of the annual appropriation. . . ." The Secretary of Education now has this responsibility. 7 U.S.C. § 326.

7. On or about February 13, 1891, A & M was designated by the Legislature as the Black Land Grant Institution for the State of Alabama.

8. In 1887, Congress had enacted the Hatch Act, 24 Stat. 440 *et seq.*, 7 U.S.C. § 361a *et seq.*, which established agricultural experiment stations at colleges created under the 1862 Morrill Act and provided funds for agricultural research. Even though the Second Morrill Act stated that the 1890 institutions such as A & M would be treated as "if it had been included under the Act of 1862," A & M has never received any funds pursuant to the Hatch Act, for racially discriminatory reasons. The Hatch Act provided the base from which the research component of land grant colleges has grown. Congress has periodically added to that research base and funding with the Adams Act of

1906, 34 Stat. 63-64, 7 U.S.C. § 369 *et seq.*, (which provided funds only for White land grant institutions), the Purnell Act of 1925, 43 Stat. 970, 7 U.S.C. § 370 (which provided funds only for White land grant institutions), the Bankhead Jones Act of 1935, 49 Stat. 436, 7 U.S.C. § 343c, *et seq.*, (which provided funds only for White land grant institutions), and 1946 Public Law 733, 60 Stat. 1083 *et seq.*, 7 U.S.C. § 427 *et seq.* (which provided funds only for White land grant institutions). In summary, all of these Acts establishing and expanding funding for agricultural research have benefited Auburn, but none of them have benefited A & M, for racially discriminatory reasons.

9. In 1914, Congress enacted the Smith-Lever Act, 38 Stat. 372 *et seq.*, 7 U.S.C. § 341 *et seq.*, authorizing the agricultural extension service. The legislative history of this Act plainly indicates racial discrimination. For example, Senator Smith of Georgia, the bill's sponsor, stated as follows:

> We will put it in our white agricultural college. We would not appropriate a dollar in Georgia to undertake to do extension work from the Negro agricultural and mechanical school. It would be a waste of money
>
> . . .

To satisfy Southern Congressmen and Senators such as Senator Smith, a provision was included in the Smith-Lever Act, allowing the States to designate which of the institutions would receive the funds for the extension

service. See 7 U.S.C. § 341. For racially discriminatory reasons, the Governor of the State of Alabama promptly and temporarily designated Auburn as the beneficiary or agency for administering the Smith-Lever Act in Alabama. Thereafter, for racially discriminatory reasons, the Legislature of the State of Alabama recognized Auburn, and not A & M, as the beneficiary of the Smith-Lever Act in the State of Alabama. This recognition has continued until the present with Code of Alabama 1975 § 2-30-1 providing that: "There shall be an Alabama extension service under the charge of and operated in connection with Auburn University. . . ."

10. In each of the three primary areas of the land grant function (agricultural teaching, research, and extension service), both the State of Alabama and the United States of America have discriminated in favor of Auburn, an 1862 Morrill Act Institution, and against A & M, an 1890 Morrill Act Institution, for racially discriminatory reasons. Those discriminatory reasons have also determined the division of funding and responsibility for such related matters as 4-H Clubs, forestry, and home economic services. This discrimination in the land grant function and related matters has continued until the present.

11. In the late 1940s, UA established an extension center in Huntsville, Alabama. At that time A & M had been in existence in or near Huntsville, Alabama for more than 70 years. On or about September 1, 1966, UA's extension center was designated as UAH. In 1969, the UA Board of Trustees approved a separate President for UAH.

12. UAH, as an extension center and as a quasi-separate institution, was established and expanded for racially discriminatory reasons. A & M is and always has been available to accept and teach students of all races. UAH, as an extension center, was established to teach White students. Prior to the summer term, 1962-63, UAH admitted no Black students. So long as it was an extension center, it admitted very few Black students. Both as an extension center and as a quasi-separate institution, it has expanded its academic programs and facilities to attract White students. Today, the percentage of Black students at UAH remains small. The establishment and expansion of UAH has impeded A & M's ability to attract students of all races and has limited the number of total students at A & M. Since there are economies of scale in the operation of a University, this limitation of A & M's students has had an even greater impact on A & M's facilities and programs.

13. The most egregious examples by UAH into academic programs where A & M was previously attracting students of all races is in the programs, both undergraduate and graduate, of education, business, and computer science. UAH duplicated these programs, and then limited A & M's ability to attract students of all races through this duplication. Likewise, there has been similar duplication in other non-engineering programs. This expansion and duplication, and the effects thereof, have continued until the present.

14. For racially discriminatory reasons, until 1975, A & M was governed by the defendant Board rather than enjoying its own Board of Trustees like traditionally White

institutions such as Auburn and UA. At least since Reconstruction, no Black person has ever served on the Board. Calhoun Junior College (hereinafter "Calhoun") was established and expanded under the direction of the Board, and then Athens College (hereinafter "Athens") was taken over and continued under the direction of the Board, despite a contrary recommendation after study by ACHE. Athens and Calhoun have, like UAH, impeded A & M's ability to attract students of all races and have limited the total number of students at A & M. The economies of scale in higher education have caused an even greater impact on A & M's facilities and other resources.

15. For racially discriminatory reasons, A & M lacks much of the authority enjoyed by traditionally White institutions such as UA and Auburn. For example, A & M, unlike UA and Auburn, does not have the right to issue bonds or condemn property. Since A & M cannot issue bonds, it is more limited than Auburn and UA in its ability to finance capital improvements.

FIRST CLAIM

16. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

17. This claim is brought pursuant to Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, and is brought against all defendants.

18. Defendants have operated and constituted a racially dual system of public higher education, as described in the First Claim of the original complaint. Defendants have failed to carry out their obligation to achieve a non-

discriminatory, unitary system of higher education. As a result of the ongoing racially dual system of public higher education, A & M has been denied capital and operational funds necessary to carry out its mission in a manner consistent with comparable traditionally White institutions of higher education, especially Auburn. This lack of funding, along with the development and expansion of UAH, and other institutions as previously alleged, have impeded the ability of A & M to attract students of all races. Furthermore, the discrimination against A & M, and in favor of Auburn, in the land grant function and related matters has damaged A & M and has limited its ability to attract students of all races.

19. As alleged in paragraphs 21 and 22 of the complaint, administrative procedures under Title VI were exhausted. Representatives of A & M and other defendants spent literally hundreds of hours in an attempt to achieve a resolution of the matters disputed herein, while this matter was pending before the United States Department of Education. Those efforts were unsuccessful in achieving a state-wide plan to accomplish a racially unitary system of higher education. By the end of 1981, it was futile to proceed any further in the administrative proceeding. After this matter was referred to the Justice Department for litigation, further meetings were held with representatives of all, or almost all, parties to this action, and in those meetings additional attempts were made to achieve a resolution of the matters disputed herein. Those efforts likewise failed, and further efforts were futile.

20. Specifically with regard to the dispute over the land grant function and related matters, while this dis-

pute was in the administrative proceeding, representatives of A & M met with representatives of Auburn in an attempt to achieve a resolution of the land grant issue. No progress was made on that issue, and further efforts to settle the land grant dispute were futile. Nevertheless, after this matter was referred to the Justice Department, an additional meeting was held with representatives of the Justice Department, representatives of A & M, and representatives of Auburn. At that time, representatives of Auburn refused to discuss the vast majority of the disputed matters related to the land grant function. Further attempts at resolving the disputed matters related to the land grant function were clearly futile. Any other administrative attempts by A & M to achieve compliance with Title VI would achieve nothing for A & M. Even if A & M debarred some defendants from the receipt of certain federal funds, this would not achieve what A & M requests here or benefit A & M.

21. Through their agreements under Title VI, and through the application of Title VI, all defendants have waived sovereign immunity.

22. The relief requested in this claim is equitable in nature. The racial discrimination complained of is intentional, continuing in nature and has continued until the present.

23. For the system of public higher education in the State of Alabama to become racially unitary, A & M must have the following relief:

a) A & M must be enhanced significantly. A & M must receive large amounts of capital funds in order to improve its campus so that it will be

more attractive to students of all races. In addition, A & M must receive large sums of money to enhance its faculty and to offer more incentive to students of all races to come to A & M. This should not be construed as a request for legal damages. Instead, it is equitable relief necessary for the achievement of a racially unitary system of public higher education.

b) A & M must become an equal partner with Auburn in the land grant function and related matters. This means that A & M must receive equitable land grant funding and equal responsibility with Auburn in agricultural teaching, research and extension services. This further means that in the area of forestry, 4-H Clubs, home economic services and other matters related to the land grant functions, A & M must receive equitable funding and play an equal role with Auburn.

c) UAH must be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering, non-medically related areas, and from expanding into these and all other programs in such areas. Likewise, other institutions within the immediate area served by A & M must be at least limited in scope. If A & M is to be able to attract students of all races and to become a necessary part of a racially unitary system, while at the same time preserving its tradition and heritage as a traditionally black institution of higher education, then it must be the broad based public university in its immediate area.

WHEREFORE, A & M requests that the Court order defendants to achieve a racially unitary system of higher education, order that the relief stated above be granted to A & M, and grant it such other relief as may be ap-

propriate, including the reimbursement of A & M for the attorney's fees and other costs which it has incurred in the prosecution of these claims.

SECOND CLAIM

24. Paragraphs 1 through 23 are hereby realleged and incorporated herein.

25. A & M is and has been a third party beneficiary of the agreements which all other defendants executed, requiring them to comply with Title VI.

26. The relief requested herein is equitable in nature.

27. Defendants have breached their agreements to comply with Title VI by failing to achieve a unitary system of public higher education, and A & M has been damaged as described.

WHEREFORE, A & M requests that the Court order defendants to achieve a racially unitary system of higher education, order that the relief stated above be granted to A & M, and grant it such other relief as may be appropriate, including the reimbursement of A & M for the attorney's fees and other costs which it has incurred in the prosecution of these claims.

THIRD CLAIM

28. Paragraphs 1 through 23 are hereby realleged and incorporated herein.

29. By accepting federal funds after the effective date of Title VI and not taking steps to achieve a racially unitary system of public higher education, defendants have created a constructive trust, whereby they are obli-

gated to provide A & M, as one of the beneficiaries of that constructive trust, with the relief described above, necessary to achieve a unitary system of public higher education.

30. The relief requested based on this claim is equitable in nature.

WHEREFORE A & M requests that the Court order defendants to achieve a racially unitary system of higher education, order that the relief stated above be granted to A & M, and grant it such other relief as may be appropriate, including the reimbursement of A & M for the attorney's fees and other costs which it has incurred in the prosecution of these claims.

FOURTH CLAIM

31. Paragraphs 1 through 30 are hereby realleged and incorporated herein.

32. The same kind of constructive trust is created pursuant to 42 U.S.C. § 1981 and § 1983 and the Fourteenth Amendment. The discrimination complained of and the effects thereof are continuing in nature and have contained until the present. A & M is requesting only equitable relief in this claim.

WHEREOF, A & M requests that the Court order defendants to achieve a racially unitary system of higher education, order that the relief stated above be granted to A & M, and grant it such other relief as may be appropriate, including the reimbursement of A & M for the attorney's fees and other costs which it has incurred in the prosecution of these claims.

FIFTH CLAIM

33. Paragraphs 1 through 32 are hereby realleged and incorporated herein.

34. The law of the State of Alabama operates to create a constructive trust, as described above. A & M is requesting only equitable relief in this claim.

WHEREFORE, A & M requests that the Court order defendants to achieve a racially unitary system of higher education, order that the relief stated above be granted to A & M, and grant it such other relief as may be appropriate, including the reimbursement of A & M for the attorney's fees and other costs which it has incurred in the prosecution of these claims.

SIXTH CLAIM

35. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

36. This claim is brought pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution. Pursuant to this claim, A & M requests only prospective equitable relief.

37. Based on intentionally or willful racial discrimination, A & M has been denied an equal role with Auburn in the land grant function and related matters, as described above.

WHEREFORE, A & M requests that defendants be ordered to grant A & M an equal role in the land grant function and related matters and equitable funding to support said role for the future. A & M also requests that it

be awarded such other relief as may be appropriate, including reimbursement for the attorney's fees and costs it has incurred in prosecuting this action.

SEVENTH CLAIM

38. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

39. This claim is brought pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution. Pursuant to this claim, A & M requests only prospective equitable relief.

40. Due to intentional or willful discrimination, UAH and other institutions of higher education have been established and expanded in the immediate area of A & M. This discrimination and the effects thereof are continuing in nature and have continued until the present. This has damaged A & M and damaged its ability to attract students of all races.

WHEREFORE, A & M requests the Court to order defendants at least to limit the scope of said institutions so as not to infringe upon A & M's ability to attract students of all races. A & M also requests that it be awarded such other relief as may be appropriate, including reimbursement for the attorney's fees and costs it has incurred in prosecuting this action.

EIGHTH CLAIM

41. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

42. The Second Morrill Act required an equitable division of land grant funding if a state chooses to have separate Black and White land grant institutions. There has never been such an equitable distribution of land grant funding in the State of Alabama, and A & M has been damaged severely by this lack of such an equitable distribution.

43. Under this claim, A & M is requesting only prospective equitable relief.

WHEREFORE, A & M request the Court to order defendants to equitably divide all future land grant funding between A & M and Auburn. A & M also requests that it be awarded such other relief as may be appropriate, including reimbursement for the attorney's fees and costs it has incurred in prosecuting this action.

NINTH CLAIM

44. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

45. The Second Morrill Act, and particularly its requirement for an equitable division of land grant funding, with which defendants have never complied, establish a constructive trust of which A & M is a beneficiary. Under that constructive trust, the Court should award A & M significant funds, according to proof, as equitable restitution to make up for the many years of discrimination and the many years of denial of equitable land grant funding which A & M has experienced.

WHEREFORE, A & M requests the Court to order defendants to provide such equitable restitution as the

Court deems proper to A & M. A & M also requests that it be awarded such other relief as may be appropriate, including reimbursement for the attorney's fees and costs it has incurred in prosecuting this action.

TENTH CLAIM

46. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

47. The Second Morrill Act places a requirement on officials of the United States of America, initially the Secretary of Interior, and currently the Secretary of Education, to ascertain and certify whether the Second Morrill Act has been complied with. The provision requiring equitable funding has never been complied with, and the provision requiring that institutions such as A & M, created under the Second Morrill Act, be treated as if they were established under the First Morrill Act, like Auburn, has never been complied with.

48. A & M has been damaged by this gross failure by officials of the United States of America to enforce the above described provisions of the Second Morrill Act in that it has lost substantial funding, and continues to lose substantial funding.

WHEREFORE, A & M requests the Court to order the United States of America to pay to A & M the funds which its officials have caused A & M to lose and to require those officials, particularly the Secretary of Education, to enforce the Second Morrill Act. A & M also requests that it be awarded such other relief as may be appropriate.

ELEVENTH CLAIM

49. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

50. This claim is brought against the United States of America as well as against defendants.

51. This claim is brought pursuant to the Fifth Amendment to the United States Constitution as it related to the United States of America and pursuant to the Fourteenth Amendment to the United States Constitution as it relates to defendants.

52. The language of the Second Morrill Act almost precisely states the holding of *Plessy v. Ferguron*, 163 U.S. 537 (1896), which was expressly overruled in *Brown v. Board of Education*, 347 U.S. 483 (1954). Nevertheless, this language authorizing separate but equal treatment of traditionally White and traditionally Black land grant institutions remains a part of the United States Code. 7 U.S.C. § 323.

53. This separate but so called equal treatment is a plain violation of the equal protection clause of the Fourteenth Amendment and the similar requirement of the Fifth Amendment.

54. This separate but so called equal treatment has damaged and continues to damage A & M in the manner previously described.

WHEREFORE, A & M requests the Court to declare the separate but equal provision of the Second Morrill Act unconstitutional and to order that A & M as an 1890 Morrill Act institution be treated exactly the same as Auburn as an 1862 Morrill Act institution.

Respectfully submitted,

STEWART, FALKENBERRY & WHATLEY
Suite 305, 2100 16th Avenue South
Birmingham, Alabama 35205
(205) 933-0300

By /s/ _____
JOE R. WHATLEY, JR.

_____
/s/ JOHN C. FALKENBERRY

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing instrument has been served on the following by depositing same in the United States Mail, postage prepaid, on this 13th day of December, 1983:

Ira Dement, Esquire
Glenn Powell, Esquire
Charles Coody, Esquire
Solomon Seay, Esquire
Edward Allen, Esquire
Thomas Thagard, Esquire
Walter J. Merrill, Esquire
Fred Ingram, Esquire
Richard Calhoun, Esquire
Frank Ellis, Esquire
Robert L. Potts, Esquire
Maxey Roberts, Esquire
Frank Donaldson, Esquire
Thomas M. Keeling, Esquire
Harvey J. Handley, III, Esquire
Jay P. Heubert, Esquire
Thomas M. Todd, Esquire
Demetrius Newton, Esquire
J. U. Blacksher, Esquire

/s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	CV83-C-1676-S
STATE OF ALABAMA, et al., Defendants.	)	

SUPPLEMENT TO AMENDED CLAIMS

The Board of Trustees for Alabama A & M University hereby supplements its amended claims by correcting paragraph 10 thereof to read as follows:

10. In each of the three primary areas of the land grant function (agricultural teaching, research, and extension service), both the State of Alabama and the United States of America have discriminated in favor of Auburn, an 1862 Morrill Act Institution, and against A & M, an 1890 Morrill Act Institution, for racially discriminatory reasons. Those discriminatory reasons have also determined the division of funding and responsibility for such related matters as 4-H Clubs, forestry, and home economic services. Another area of the land grant function includes engineering and medically related academic programs, which A & M has been deprived of for racially discriminatory reasons. This discrimination in the land grant function and related matters has continued until the present.

Respectfully submitted,

/s/ Joe R. Whatley, Jr.

/s/ John C. Falkenberry

OF COUNSEL:

STEWART, FALKENBERRY & WHATLEY
Suite 305, 2100 16th Avenue South
Birmingham, Alabama 35205
(205) 933-0300

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing instrument has been served on the following by depositing same in the U. S. Mail, postage prepaid, on this 17th day of April, 1984:

Ira Dement, Esquire
Glenn Powell, Esquire
Charles Coody, Esquire
Solomon Seay, Esquire
Edward Allen, Esquire
Thomas Thagard, Esquire
Walter J. Merrill, Esquire
Fred Ingram, Esquire
Richard Calhoun, Esquire
Frank Ellis, Esquire
Terry M. Putnam, Esquire
Maxey Roberts, Esquire
Frank Donaldson, Esquire
Thomas M. Keeling, Esquire
Harvey J. Handley, III, Esquire
Jay P. Heubert, Esquire
Thomas M. Todd, Esquire
Demetrius Newton, Esquire
J. U. Blacksher, Esquire

/s/ Joe R. Whatley, Jr.